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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 773

SAM CERAMI,
Petitioner,

versus

WM. D. HAAS, JR.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

and

SUPPORTING BRIEF

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Filed, March 1, 1943.

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SUPREME COURT OF THE UNITED STATES

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No.

SAM CERAMI,
Petitioner,

versus

WM. D. HAAS, JR.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES.

The petition of SAM CERAMI, respectfully shows:

1. For the reasons hereinafter set out, the final judgment in favor of Wm. D. Haas, Jr., and against petitioner by the Supreme Court of Louisiana in the case of *Wm. D. Haas, Jr., v. Sam Cerami, No. 36,318, ... La., ..., 10 So. 2d. 61,* (Adv. November 19, 1942), is erroneous, and the Federal questions presented and the rulings thereon are such as to bring the case within the jurisdiction of this

Court; and petitioner believes that a writ of certiorari should be granted by this Court, directed to the Supreme Court of Louisiana and commanding it to certify and send up to this Court a complete transcript of the record of the proceedings had in said case in the trial court and in the Supreme Court, in order that the same may be reviewed by this Court and such judgment may be rendered as the law and the facts may warrant. As required by the law of Louisiana, a complete transcript, in triplicate, of the proceedings in the trial court was prepared and certified by the clerk of that court and was filed by petitioner, as appellant, in the Supreme Court, and one copy thereof remains permanently in the archives of said Court.

SUMMARY AND STATEMENT OF THE CASE

2, (a). The respondent herein, as plaintiff, filed his suit against petitioner, as defendant, and alleged in his petition, (R. 1), that, by the instrument, (R. 3), which he filed with and as part of his petition, defendant had *sold* to him a royalty interest in the land described therein, that, by the judgment in *Cerami v. Haas, 195 La. 1048, 197 So. 752*, the Supreme Court of Louisiana had *upheld the sale*, that, by the judgment in *Angichiodo v. Cerami et al., 28 Fed. Supp. 720*, the United States District Court for the Western District of Louisiana had held plaintiff to be a *holder* in good faith as a *purchaser* on faith of the public record, and that he was entitled to a royalty deed *evidencing said sale*. He prayed for judgment ordering defendant to perform *the contract*, and decreeing that, in the event he should fail to do so, the judgment should stand as a muniment of title in plaintiff to the royalty *purchased* by him.

The alleged "sale," which plaintiff filed with and as part of his petition reads:

"November 1, 1938

"Mr. W. D. Haas, Jr.,
Bunkie, La.

"This will confirm our verbal understanding regarding title of the West ½ of NE Quarter, of Sec. 6, T 2 S, R. 3 East, Avoyelles Parish, La. It is understood and agreed that we will execute royalty deed for an additional one-quarter of the royalty interest under the above described land; upon perfection of title defects now being straightened out. The price to be as formerly agree(d) upon, or $30.00 per acre base.

"Very truly yours,

"Sam Cerami."

"State of Louisiana
Parish of Avoyelles

"Before me, the undersigned authority in and for the Parish State, personally came and appeared: W. D. Haas, Jr., who being first duly sworn, did depose and say: That the above and foregoing instrument and agreement was executed by Sam Cerami on the date first above written in the presence of affiant; that the said Sam Cerami executed same of his own free will.

"W. D. Haas, Jr.

"Sworn to and subscribed before me this 10th day of February, 1939.

"C. E. Laborde, Jr.,
Notary Public."

2, (b). Defendant filed an exception of prematurity, and exceptions of no right of action and no cause of action, (R. 4). Later he withdrew the exception of prematurity, so that the case might be tried, (R. 5), and the other exceptions, after submission, were "referred to the merits," that is formal decision on them was deferred until after hearing on the merits.

2, (c). Reserving his rights under the latter exceptions, defendant answered, (R. 7), denying catagorically the allegations of the petition, averring that, for want of mutuality and consideration, the instrument sued on was not a reciprocal contract, and pleading, (R. 10, 13), in the event the court should hold that the instrument was an agreement to sell, that the price stipulated in the instrument was out of all proportion to the value of the royalty interest to be sold, a ground for nullity under statute law of Louisiana.

2, (d). On the hearing of the case, counsel for plaintiff (R. 18), offered in evidence the instrument sued on, P. Ex.-1, (R. 3, 26), as a sale, to which counsel for defendant objected, (R. 19), on the ground that the instrument was not admissible to prove title in plaintiff, because it was not in form and substance an act translative of title and was not a complete reciprocal contract. Counsel for plaintiff offered in evidence the petition and the answer of Haas in *Angichiodo v. Cerami et al.*, P. Ex. 2, (R. 27-47), the opinion (called decree) in that case P. Ex. 3, *28 Fed. Supp. 720*, (R. 47), and the judgment dismissing that suit as to Haas, P. Ex. 4, (R. 53), to all of which counsel for defendant objected as irrelevant and immaterial. Counsel for plaintiff offered in evidence the entire record in *Cerami*

v. Haas, (R. 198-209), with particular reference to the judgment therein, P. Ex. 7, *197 So. 752,* (R. 203). To the offer of this and all the other documents and of any testimony whatever, counsel for defendant objected, for the reason that plaintiff was suing on an alleged completed and executed sale, and the remedy of specific performance is unknown in Louisiana where the contract sued on is alleged to be a sale. All the objections were overruled.

Counsel for defendant, (R. 21), offered in evidence the testimony of Moresi, Carnahan and Lambremont, taken before a notary public, (R. 69), together with numerous documents bearing upon the production of oil from defendant's land, D. Ex-2 to D. Ex-22, identified with and returned as part of said testimony, for the purpose of proving the actual value and the market value of the royalty interest which was the subject of the alleged contract, in support of the allegations of paragraph 17, (R. 10), of his answer, as amended, (R. 13). The objection of counsel for plaintiff that the evidence had no bearing on the issues of the case was sustained. Whereupon, counsel for defendant reserved an exception to the ruling and made the entire offering part of it. Counsel for defendant also sought to prove by plaintiff himself the value of royalties in this land on February 10, 1939, but objection by counsel for plaintiff was sustained.

2, (e). After hearing the case on the merits the court formally overruled defendant's exceptions of no right of action and no cause of action, and proceeded to decide the case on the merits, (R. 56). Holding that the validity of the instrument sued on *as a sale* was settled by the judgment in *Ceramie v. Haas,* and rejecting all evidence offered by defendant to prove that the price was out of all proportion to

the value of the royalty interest, the court held that the instrument was *a sale* as of *February 10, 1939*, the date on which it was said in *Cerami v. Haas* that Haas impliedly accepted the contract, and rendered judgment ordering defendant to execute a deed conveying the royalty interest to plaintiff as of *February 10, 1939*, and decreeing that, in the event of his failure to do so, the judgment stand as a muniment of title in plaintiff, (R. 60). A rule for a new trial, (R. 61), was overruled.

2, (f). Defendant appealed to the Supreme Court. Holding, (R. 181), that the validity of the instrument sued on, *as an agreement to sell*, was settled by the judgment in *Cerami v. Haas* and, in contradiction of reasons upon which that judgment was based, that the affidavit by Haas on *February 10, 1939*, appended to the instrument was also "evidence of the agreement between the parties," and rejecting all evidence offered by defendant to prove that the price was out of all proportion to the value of the royalty interest, that Court held that the instrument was *a contract, an agreement to sell*, as of *November 1, 1938*, the date on which it was signed by defendant only and on which it was held in *Cerami v. Haas* that it "showed on its face the reciprocal consent of the parties," and affirmed the judgment of the district court, on July 20, 1942.

2, (g). Defendant petitioned for a rehearing, (R. 186). The Court, by an opinion *per curiam*, (R. 194), held that the instrument sued on was *a contract, an agreement to sell*, as of *February 10, 1939*, the date on which it was said in *Cerami v. Haas* that Haas impliedly accepted the contract and which was also the date of the affidavit by Haas appended to the instrument and said in the original

opinion in this case to be "evidence of the agreement between the parties," and still rejected all evidence offered by defendant to prove that the price was out of all proportion to the value of the royalty interest, and refused a rehearing, on October 7, 1942, and the judgment became final. This petition is filed on March 1, 1943.

2, (h). Petitioner then petitioned the Chief Justice of the Supreme Court of Louisiana for a stay of execution of the judgment for ninety days within which he would apply to this Court for relief, (R. 195), which stay was opposed by respondent, (R. 196), and was denied, on the ground that petitioner, the defendant in the case, had not taken a suspensive appeal from the trial court to the Supreme Court, (R. 196). Whereupon, petitioner gave the Chief Justice and the Supreme Court and respondent formal notice of his intention to apply to this Court for a writ of certiorari to the Supreme Court of Louisiana. He did not then apply to this Court for a stay of execution, because he was satisfactorily informed by the producer and purchaser of the oil from his land that the proceeds of said oil credited to the royalty interest here involved would continue to be held in suspense until final disposition of this controversy, and they have been informed of the delays granted by Mr. Justice Black, in which petitioner might file his petition in this Court for certiorari, and they have renewed their assurance that the funds would be held in suspense.

JURISDICTION

3, (a). The Court has jurisdiction in this case, under Section 237 of the Judicial Code, 28 U. S. C. A. 344, paragraph (b), to review by certiorari the action of the

Supreme Court of Louisiana, the highest court of the State in which a decision could be had, in that, in conformity with the legal procedure in such cases in Louisiana, petitioner timely set up and claimed certain titles and rights under that clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides, "Nor shall any State deprive any person of life, liberty, or property, without due process of law," and said claim was denied, as is hereinafter set out in detail with respect to each Federal question presented.

3, (b). Although neither the trial court nor the Supreme Court ruled directly upon the Federal questions so presented, the decision was not and could not have been made without considering those questions, and the necessary effect of the judgment is a denial of the titles and rights so claimed by petitioner. The decision is not in accord with the applicable decisions of this Court.

3, (c). The United States Supreme Court has jurisdiction to review by certiorari a judgment of a state court of last resort, alleged by a petitioner to deny a right, title or immunity claimed by him under the Constitution of the United States.

U. S. C. title 28, 344 (b);

Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 98, 82 L. Ed. 685, 689;

International Steel & Iron Co. v. National Surety Co., 297 U. S. 657, 666, 80 L. Ed. 961, 967;

Virginia v. Imperial Coal Sales Co., 293 U. S.

15, 16, 17, 79 L. Ed. 171, 173;

Live Oak Water Users Ass'n. v. Railroad Commission of California, 269 U. S. 354, 357, 70 L. Ed. 305, 308;

Grayson v. Harris, 267 U. S. 352, 357, 69 L. Ed. 652, 655;

Baker v. Dreusedow, 263 U. S. 137, 141, 68 L. Ed. 212, 215;

Rogers v. Hennepin County, 240 U. S. 184, 188, 60 L. Ed. 594, 597;

Henderson v. Henderson Bridge Co., 173 U. S. 592, 43 L. Ed. 823.

"Whether the Federal question was adequately presented and decided is itself a Federal question."

Lowell v. Griffin, 303 U. S. 444, 450, 82 L. Ed. 949, 952.

3, (d). Where it affirmatively appears upon the face of the record that a Federal question constituting an appropriate ground for review was presented and was expressly or necessarily decided by a state court of last resort, in order to render its judgment, the Supreme Court has jurisdiction to review the judgment.

Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U. S. 312, 319, 320, 74 L. Ed. 870, 875;

Mellon v. O'Niel, 275 U. S. 212, 214, 72 L. Ed. 245, 246;

Whitney v. California, 274 U. S. 357, 360, 71 L. Ed. 1095, 1099, and numerous decisions there cited;

Steines v. Franklin County, 14 Wall. 15, 21, 20 L. Ed. 846, 848.

3, (e). Where the ruling claimed to infringe Federal rights is first made by the state court of last resort, a Federal question raised with respect thereto on application for rehearing is timely, since it is raised at the first opportunity.

International Steel & Iron Co. v. National Surety Co., 297 U. S. 657, 666, 80 L. Ed. 961, 966;

Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U. S. 358, 367, 77 L. Ed. 360, 368;

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 677, 678, 74 L. Ed. 1107, 1112;

Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U. S. 312, 320, 74 L. Ed. 870, 875;

Saunders v. Shaw, 244 U. S. 317, 320, 61 L. Ed. 1163, 1165.

QUESTIONS PRESENTED

The nature of the case is fully disclosed in the foregoing Summary and Statement of the Case. Bearing upon the several questions presented and coming within the jurisdiction of the Court, the record shows:

FIRST QUESTION

4, (a). The first question presented is, whether or not the ruling of the Supreme Court of Louisiana herein, by giving effect to the judgment in *Cerami v. Haas, 195 La. 1048, 197 So. 752,* (R. 203), as *res judicata* and "the law of the case" on the validity of the instrument sued on, (R. 3, 26), *as an agreement to sell,* and founding its judgment against petitioner upon that ruling deprive petitioner of his vested rights and of his property, without due process of law, in contravention of that clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

4, (b). The question was fairly presented in petitioner's application for a rehearing in the Supreme Court, (R. 186), paragraphs 3 and 13:

> "3. The Court erred in holding that the district court and this Court had jurisdiction to consider and try in the case of Cerami v. Haas the question of title and to render judgment thereon, not responsive to the pleading and not on any issue presented for decision, and in holding that the validity of the instrument involved was *res judicata* by said judgment, or that said judgment, 'as far as it went, settled finally the law of the case,' that is, 'settled finally' the question of validity of the instrument."

> "13. The judgment herein, by giving effect, as *res judicata* and "the law of the case," to the judgment in the case of Cerami v. Haas, which was not responsive to the pleadings or within the issues

of that case and which the Court had no jurisdiction to render, deprives appellant of his vested rights and his property without due process of law, in contravention of that clause of Article IV, Sec. 15 of the Constitution of Louisiana, providing that vested rights shall not be divested unless for the purposes of public utility, and of Article I, Sec. 2, of the Constitution of Louisiana, providing that no person shall be deprived of life, liberty or property, except by due process of law, and of that clause of the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty, or property, without due process of law."

4, (c). The Supreme Court denied a rehearing on October 7, 1942, on an opinion *per curiam*, (R. 194), without referring to the State and Federal constitutional questions presented.

4, (d). The Federal question was timely raised, because the ruling was first made by the Supreme Court, in its opinion, (R. 181), and the application for rehearing presented the first opportunity for petitioner to raise the question. Under the established jurisprudence of Louisiana *res judicata* must be specially pleaded, as it was in this case. The plaintiff, respondent here, pleaded and persisted throughout that the instrument was a *sale* and that its validity *as a sale* had been *upheld*, was *res judicata*, by the judgment in *Cerami v. Haas*, and the trial court *so held*. Since that judgment, whether valid or not, on its face unmistakably did not hold that the instrument was a *sale* and could not serve as proof of its judicial confirmation as a *sale*, defendant, petitioner here, was not required to plead its nullity. The Supreme Court, however, held that the in-

strument was an *agreement to sell*, subject to the suspensive condition expressed therein, and that its validity as an *agreement to sell* was *res judicata* by the judgment in *Cerami v. Haas*, and that, even if, strictly speaking, that were not true, that judgment did settle finally the law of the case.

Thus the Supreme Court invoked and maintained against defendant a ruling not only not pleaded by plaintiff but actually contradictory of plaintiff's pleading and contentions, since under the statute law of Louisiana, a *sale* and an *agreement to sell* are entirely different in their nature and in their effects. Then, for the first time did it become necessary for petitioner to question the validity of the judgment in *Cerami v. Haas*, and to plead that giving effect to it, as *res judicata* and "the law of the case," deprived him of his property, without due process of law. In view of the settled jurisprudence above mentioned and of the pleading and persistent course of respondent, petitioner was not required to anticipate the ruling of the Supreme Court.

SECOND QUESTION

5, (a). The second question presented is, whether or not the ruling of the Supreme Court that the instrument upon which plaintiff is proceeding is a complete reciprocal agreement to sell and the judgment of said Court affirming the judgment of the trial court and decreeing that petitioner is bound by said instrument and shall convey to plaintiff the one-quarter royalty interest described therein, or that said judgment shall stand as a muniment of title in plaintiff, deprive petitioner of his vested rights and of

his property, without due process of law, in contravention of that clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

5, (b). The question was presented in the original answer of petitioner, as defendant, in the court of first instance, (R. 7), in which the allegations of plaintiff's petition were denied, and in paragraphs 5, 9, 18, 11 and 19 of which defendant pleaded: 5, that there was no contract whatever between him and plaintiff respecting said royalty interest; 9, that the instrument was not a reciprocal contract and was *nudum pactum*, because it was never assented to by plaintiff and was executed by defendant without consideration; 18, that in support of the allegations of paragraph 9, he relied upon the law of Louisiana governing contracts and particularly, (a) specified articles of the Civil Code, bearing upon mutuality as an essential to the formation of a contract, and (b) specified articles of the Civil Code, bearing upon consideration as an essential to the formation of a contract; 11, that the instrument was not a grant to plaintiff of (a) the right or option to accept the contract in the future or (b) the right or option to purchase the royalty interest, because defendant executed the instrument without consideration, no time was stipulated in the instrument within which plaintiff might accept the contract or purchase the royalty interest, and plaintiff did not consent to or accept the contract; and 19, that in support of the allegations of paragraph 11, he relied upon specified articles of the Civil Code, bearing upon the right or the option to accept a contract or to purchase in the future. And in paragraph 20, he alleged:

"All the laws of the State of Louisiana governing contracts and particularly the laws enumerated in Paragraphs 18 and 19 above, are clear and free from ambiguity and the letter of said laws can not be disregarded. Only by disregarding both the letter and the spirit of those laws and substituting therefor its own fiat, could the Court render a judgment herein decreeing that defendant is bound by the instrument upon which plaintiff proceeds to convey said one-quarter royalty interest to plaintiff or that such judgment shall stand as a muniment of title in plaintiff. By so doing, the Court would . . . deprive defendant of his vested rights and of his property, without due process of law, in direct contravention of . . . that clause of the Fourteenth Amendment to the constitution of the United States, providing that no State shall deprive any person of life, liberty, or property, without due process of law."

5, (c). The trial court rendered judgment as prayed for by plaintiff, (R. 60), except that it went further than the prayer and fixed February 10, 1939, as the date as of which defendant should execute the deed and as of which the judgment would stand as a muniment of title in plaintiff, if defendant failed to execute the deed. In its opinion, (R. 56), the court did not refer to the questions presented in the above quoted paragraphs of defendant's answer. Whereupon, defendant filed a rule for a new trial, (R. 61), and in paragraph 2, "making allegations which could not appropriately be made before the judgment complained of was rendered," (a) alleged that the Court erred in holding that the instrument was a complete reciprocal contract, and, in so doing, disregarded specified articles of the Civil Code, bearing upon contracts affecting real estate, and (c) re-stated paragraph 20 of the answer as applicable.

5, (d). The Supreme Court having affirmed the judgment of the district court, (R. 181-185), defendant filed his petition for rehearing, (R. 186), in which he averred that the judgment was erroneous and in paragraphs 4, 5, 6, 7, 8 and 9 set out specifically errors bearing upon the question of validity of the instrument involved, as a complete reciprocal contract. And in paragraph 14 he averred:

> "The judgment herein, by giving effect, as a complete and enforcible agreement to sell, to the letter of November 1, 1938, signed by appellant only, is in contravention of the statute law of the State of Louisiana governing contracts, and particularly, the following articles of the Civil Code: Arts. 1765, 1766, 1768, 1780, 1797, 1798, 1800, 2439, 2440, 2275 and 2462, bearing upon mutuality as an essential to the validity of the contract; Arts. 1768, 1893, 1896 and 2462, bearing upon consideration as an essential to the validity of the contract; and Arts. 1893, 1896, 2462, 1801, 1802 and 1809, bearing upon the right or the option to consent to or accept the contract at a later date, all of which are clear and free from ambiguity. By disregarding both the letter and the spirit of those laws and substituting therefor its own fiat, the Court has disregarded also the plain mandate of Article 13 of the Civil Code of Louisiana, and has indulged in judicial legislation, in contravention of Article VII, Sec. 1, Article II, Secs. 1 and 2, and Article III, Sec. 1, of the Constitution of Louisiana; and said judgment deprives appellant of his property without due process of law, in contravention of that clause of Article IV, Section 15, of the Constitution of Louisiana, providing that vested rights shall not be divested unless for purposes of public utility, and of Article I, Sec. 2, of the Constitution of Louisiana, providing that no

person shall be deprived of life, liberty, or property, except by due process of law, and that clause of the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty, or property, without due process of law."

5, (e). The Supreme Court denied a rehearing on October 7, 1942, on an opinion *per curiam*, (R. 194), in which it was held that the date of the *contract to sell* was February 10, 1939, instead of November 1, 1938. The Court did not refer to the State and Federal constitutional questions presented.

THIRD QUESTION

6, (a). The third question presented is, whether or not the ruling of the Supreme Court that it was not legal and proper, in order to determine whether or not the price of $600 was out of all proportion to the value of the royalty interest on to take the value of the royalty interest the date of the sale, that is, on the date that the right accrued to each party to demand and enforce specific performance of the contract, and the judgment of said Court, affirming the judgment of the trial court and decreeing that petitioner is bound by the instrument upon which plaintiff proceeds and shall convey to plaintiff the one-quarter royalty interest described therein, or that said judgment shall stand as a muniment of title in plaintiff, deprive petitioner of his vested rights and of his property, without due process of law, in contravention of that clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

6, (b). In paragraph 17 of his answer, (R. 7), as amended, (R. 14), defendant, so pleading only in the event the court should hold the instrument upon which plaintiff was proceeding to be a complete reciprocal contract to sell, averred that the price was out of all proportion to the value of the one-quarter royalty interest which was the subject of the contract, that the price which plaintiff sought to pay was $600.00, "while the value of said royalty interest was at all times greatly in excess of $600.00 and was at the time this suit was filed and is now not less than $1,250 per royalty acre and a total of not less than $25,643."

6, (c). During the trial of the case, (R. 21), defendant offered in evidence the testimony of Moresi, Carnahan and Lambremont, taken before a notary public, together with exhibits, D-2 to D-22, inclusive, identified with and returned as part of said testimony, (R. 69-177), all of which, on objection of plaintiff's counsel, was ruled inadmissible, as irrelevant and immaterial. Whereupon, counsel for defendant excepted to the court's ruling and made the testimony and exhibits part of his exception, so that the appellate court could determine whether or not they were admissible and, if so, give them the same consideration as if they had been admitted and considered by the trial court.

From the testimony of Mr. Moresi, as an expert, (R. 73-75, 82-86), it appears that the value of the oil taken from defendant's land and credited to the one-quarter royalty interest involved here was, through October 31, 1940, $3,747.52, that the actual value of the oil recoverable after that date and to be credited to this one-quarter royalty interest was $90,516.52, that recovery of oil would decrease

the value of the reserve and increase the credit to this interest, so that the total of the credit and reserve would remain unchanged. From the testimony of Mr. Carnahan, (R. 75-78), and of Mr. Lambremont, (R. 78-82), it appears that on March 13, 1941, the date they testified, the twenty and one-half royalty acres comprising this one-quarter royalty interest had an actual market value of from $1,200 to $1,400 per acre, or from $24,600 to $28,700. This does not include the $3,747.52 above mentioned. The price stipulated in the letter of November 1, 1938, is $30.00 per royalty acre, and plaintiff seeks to pay $600.00.

6, (d). The district court having rendered the judgment, (R. 60), and having held in its reasons for judgment, page 60, that "the value of the royalty at the time of the transaction was speculative, (and) the present value of the royalty is not material to the issue," defendant filed his rule for a new trial, (R. 61), and in paragraph 2, "making allegations which could not appropriately be made before the judgment complained of was rendered," (b) alleged that the Court erred in holding that the disproportion between the price and the value of the royalty interest had no bearing on the merits of the case and in founding the judgment partly on lack of evidence on that subject, and in ignoring the provisions of Article 2464 of the Civil Code, and (c) re-stated paragraph 20 of the answer as applicable.

6, (e). The Supreme Court, affirming the judgment of the district court, held in its opinion, (R. 181-185), that, "in determining the question of adequacy of the price of a *contract of sale*, (under Article 2464 of the Civil Code of Louisiana), the value of the thing sold or to be sold must be taken as of the date of the contract, and not at some

subsequent date," but in the same paragraph held that the value at the date of the *contract to sell* was controlling in this case. And, observing that "the value of a royalty interest or mineral interest in unproven land is essentially speculative," the Court held, as applicable in this case, that, for that reason, there was no right of action under Article 2464 of the Civil Code "to annul a sale or an agreement for the sale of mineral rights in non-producing land, on the ground that the price stipulated is out of all proportion to the value of the mineral rights sold or to be sold." And the Court did not consider at all the actual value and the market value of the royalty at the time the suit was filed or at the time defendant waived the suspensive condition of the contract.

6, (f). In his petition for a rehearing, (R. 186), defendant averred, paragraphs 10 and 11, that the Court erred in holding that it was necessary to prove the value of the royalty interest on either November 1, 1938, the date on which the instrument was signed by defendant only and more than three months before the so-called acceptance by plaintiff, or February 10, 1939, the date of the so-called acceptance by plaintiff, because said ruling was contrary to the provisions of Article 2464 of the Civil Code and to the provisions of the Civil Code with respect to lesion and particularly Articles 1870 and 1871, and to the jurisprudence of the State and particularly *Ronaldson & Puckett v. Bynum, 122 La. 687, 48 So. 152.* And in paragraph 12, he averred that the Court erred in not considering the evidence of the actual value and the market value of the royalty interest involved, on January 22, 1941, the date on which defendant waived his exception of prematurity and the suspensive condition of the contract, and on which the right

accrued to each party to demand and to enforce specific performance by the other, and in not decreeing the proposed sale null and void because the price of $600 was out of all proportion to the value of the royalty interest. And in paragraph 15, page 192, he averred:

> "The judgment herein, by holding that it was not legal and proper, in order to determine whether or not the price of $600 was out of all proportion to the value of the royalty interest, to prove the value of the royalty interest on the date of the sale, that is, on the date that the right accrued to each party to demand and enforce specific performance of the contract, is in contravention of the law of Louisiana governing sales and particularly Articles 2464, 1870 and 1871 of the Civil Code. By disregarding both the letter and the spirit of those laws and substituting therefor its own fiat, the Court has disregarded also the plain mandate of Article 13 of the Civil Code, and has indulged in judicial legislation, in contravention of Article VII, Sec. 1, Article II, Secs. 1 and 2, and Article III, Sec. 1, of the Constitution of Louisiana; and said judgment deprives appellant of his property, without due process of law, in contravention of that clause of Article IV, Sec. 15, of the Constitution of Louisiana, providing that vested rights shall not be divested unless for purposes of public utility, and of Articles I, Sec. 2, of the Constitution of Louisiana, providing that no person shall be deprived of life, liberty or property, except by due process of law, and of that clause of the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty, or property, without due process of law."

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6, (g). A rehearing was denied on October 7, 1942, on an opinion *per curiam*, (R. 194), in which it was held

that the date of the contract to sell was February 10, 1939, instead of November 1, 1938, and reaffirmed and held applicable to this case the ruling that there is no right of action under Article 2464 of the Civil Code to annul an agreement to sell royalty or mineral rights in non-producing land, on the ground that the price is out of all proportion to the value of the royalty or mineral rights sold or to be sold. The Court did not refer to the State and Federal constitutional questions presented.

REASONS RELIED ON FOR ISSUANCE OF WRIT

7. Petitioner relies on the following reasons for the issuance of a writ of certiorari herein. The judgment of the Supreme Court (R. 181), is arbitrary and oppressive, in that, in violation of those provisions of the Constitutions of the United States and the State of Louisiana guaranteeing persons against being deprived of property without due process of law, it takes from petitioner royalty interests shown to be worth about $90,000 and gives them to Wm. D. Haas, Jr., for $600. Said judgment was and could have been rendered only: by giving effect as *res judicata* to the judgment in *Cerami v. Haas, 195 La. 1048, 197 So. 752* (R. 203), as holding that the instrument sued on herein (R. 3, 26), was a complete reciprocal contract to sell; by disregarding entirely the clear and unambiguous statute law of Louisiana governing contracts, comprising applicable articles of the Civil Code; by arbitrarily, and without any support in law or fact, holding that the instrument was a complete reciprocal contract to sell; by ignoring completely the suspensive condition expressed in the instrument itself, and ordering petitioner specifically to perform the instrument as an agreement to sell, as of February 10, 1939, more than three years before the happening of the

condition and nearly two years before petitioner waived the condition; by refusing to consider and apply the uncontradicted evidence of the actual value and the market value of the royalty interest involved, to determine whether or not the price was out of all proportion to the value of the royalty interest as of the date of the sale, that is, the date on which petitioner waived the suspensive condition and, if in fact the instrument was a reciprocal agreement to sell, each party acquired the right to demand and enforce specific performance.

THE QUESTIONS ARE SUBSTANTIAL

8. The questions involved in this case are substantial, with respect to both petitioner's interest and the general or public interest. The value of the royalty interest involved was shown in the testimony to be about $90,000, about $16,000 of which are now in funds held in suspense to the credit of this royalty interest by the producer of oil from petitioner's land, pending termination of this litigation, and the amount in suspense increases at about $500 per month. For that value and cash, if the judgment of the Supreme Court of Louisiana should stand, petitioner will receive $600, somewhat less than one percent. of the value and money in and. The case is important also, because petitioner comes to this Court for protection and preservation of his constitutional rights, which are in grave jeopardy, because of the decision of the highest court of his home State, a decision that counsel believe is so lacking in support that they unhesitatingly advised application to this Court. It is of paramount public or general concern that the constitutional safe-guards be not relaxed, especially in difficult times of unrest.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue herein, directed to the Honorable the Supreme Court of the State of Louisiana and commanding that Court to certify and send up to this Court for review and determination a transcript of the record of the proceedings in the case of *Wm. D. Haas, Jr., v. Sam Cerami, No. 36,318*, on the docket of said Court, that the judgment of said Court therein be reversed, and that the Court grant to petitioner such other and further relief as to the Court may seem proper.

Respectfully submitted,

SAM CERAMI, Petitioner.
GEORGE SETH GUION,
THOMAS E. FURLOW,
R. HARRY OLIVER, JR.,
SEABORN L. DIGBY,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

SAM CERAMI,
Petitioner,

versus

WM. D. HAAS, JR.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

May It Please the Court:

This matter is before this Court on petition of SAM CERAMI, defendant and appellant, for a writ of certiorari to the Supreme Court of the State of Louisiana, the highest court of that State, to review a final judgment of said Court in the case of *Wm. D. Haas, Jr., v. Sam Cerami, No. 36,318,* ..... *La.* ....., *10 So. 2d 61,* (Adv. November 19, 1942), (R. 181).

JURISDICTION

This Court has jurisdiction to grant certiorari, under U. S. C. title 28, 344 (b), and to inquire into questions of fact and of law and fact, for the reasons: (a) Petitioner alleges that the judgment of said Court denies a right or title claimed by him under the Constitution of the United States timely raised by him in conformity to the rules of practice of that State; (b) that a ruling complained of was first made by the Supreme Court, and he timely raised the Fedeeral question with respect to it, in a petition for rehearing in that Court; (c) that said Court did not directly rule on any of the three Federal questions raised by him, but the judgment was not and could not have been rendered under principles broad enough to support it, without the Court considering said questions and denying his claim; (d) that said judgment is not supported by any legal evidence, and the Court was able to render it only by rejecting all his evidence; and (e) that said judgment is in contravention of articles of the Constitution and statutes of that State.

The Supreme Court has jurisdiction to review by certiorari a judgment of a state court of last resort, alleged by a petitioner to deny a right, title or immunity claimed by him under the Constitution of the United States.

> *Virginia Imperial Coal Sales Co., 293 U. S. 15, 16, 17, 79 L. Ed. 171, 173;* and cases cited in paragraph 3 (c) of the petition.

Where the ruling claimed to infringe Federal rights is first made by the state court of last resort, a Federal question raised with respect thereto on application for rehearing is timely, since it is raised at the first opportunity.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 677, 678, 74 L. Ed. 1107, 1112; and other cases cited in paragraph 3 (e) of the petition.

Where it affirmatively appears upon the face of the record that a Federal question constituting an appropriate ground for review was presented and was expressly or necessarily decided by a state court of last resort, in order to render its judgment, the Supreme Court has jurisdiction to review the judgment.

Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U. S. 312, 319, 320, 74 L. Ed. 870, 975; and other cases cited in paragraph 3 (d) of the petition.

Where the asserted right has been denied the Supreme Court is not concluded by a finding of fact or of mixed fact and law, made in the state court; the Supreme Court will examine the evidence to see whether or not it supports the decision against the Federal right.

Great Northern R. Co. v. Washington, 300 U. S. 154, 165, 81 L. 573, 581;
Norris v. Alabama, 294 U. S. 587, 589, 79 L. Ed. 1079, 1081.

STATEMENT OF THE CASE

In his petition the plaintiff alleged that on November 1, 1938, respondent sold him a one-fourth royalty interest in certain lands, and agreed *in the sale* to deliver a deed therefor upon perfection of a then apparent defect in the title. He filed with and as part of the petition a copy of "contract," (R. 3, 26). He alleged that by judgment in

Cerami v. Haas, (R. 203), the validity of the *sale* had been upheld, and that in the suit of *Angichiodo v. Cerami et al.,* (R. 47, 53), there was judgment decreeing him to be a *holder* in good faith as having *purchased* on his faith in the public records, and that he had demanded and was entitled to a royalty deed evidencing the *sale* of said royalty interest; and he prayed for such judgment.

Plaintiff relied upon the judgment in *Cerami v. Haas,* as *res judicata* on the validity of the instrument as a sale, and did not allege acceptance of the contract or consideration. Since the *Angichiodo* suit claiming title to the land was still pending, petitioner filed an exception of prematurity, (R. 4), which he withdrew, (R. 5), after his counsel examined the opinion of the Judge of the United States Court in *Angichiodo v. Cerami,* (R. 47, 53), and believed the judgment would not be reversed on appeal. Defendant filed an answer, (R. 7), denying categorically the allegations of the petition, and also alleged nullity of the instrument, for want of mutuality and consideration. Relying on the general law of Louisiana governing contracts, and specifically certain articles of the Civil Code, he alleged that only by disregarding both the letter and the spirit of those laws could the court render against him the judgment plaintiff sought, paragraphs 5, 9, 11, 18, 19 and 20 of the answer. In paragraph 17 of the answer, so pleading only in the event the court should hold that the instrument upon which plaintiff was proceeding was a complete reciprocal agreement to sell, defendant alleged that the price of $600 was out of all proportion to the value of the royalty interest which was the subject of the instrument, which he alleged to be more than $25,000. He filed a supplemental answer, (R. 13), to make the allegations of paragraph 17 more certain.

On the trial of the case, counsel for plaintiff offered in evidence the instrument sued on, to which counsel for defendant objected on the ground that the instrument was not in form and substance an act translative of title, and was not a complete contract, because, as appeared on its face, plaintiff had not accepted it and defendant had executed it without consideration. Plaintiff offered the record and judgment in *Cerami v. Haas*, P. Ex. 7, (R. 198-210), and copies of proceedings and the judgment of August 14, 1939, in *Angichiodo v. Cerami*, P. Ex. 2, 3, (R. 27-53), to all of which counsel for defendant objected as irrelevant and on the ground that plaintiff was suing on an alleged completed contract of sale and there was no authority or means in law to enforce specific performance thereof. All the objections were overruled, (R. 21).

Counsel for defendant offered in evidence depositions of Moresi, Carnahan and Lambremont taken before a Notary Public, (R. 21), and D. Ex. 2 to 22, inclusive, (R. 87-177). On objection by counsel for plaintiff they were ruled inadmissible.

There was judgment for plaintiff as prayed for, except that the judgment ordered petitioner to execute a royalty deed as of February 10, 1939, the date it was said in the opinion in *Cerami v. Haas*, (R. 203), that plaintiff's acceptance of the instrument was implied from his filing it for record. Petitioner filed a rule for a new trial, (R. 61), in which he reiterated the Federal question with respect to the validity of the instrument as a complete contract and basis for judgment, and also raised a Federal question on the ground of the court having failed to give consideration to the evidence of value of the royalty interest, and giving judgment against him.

Petitioner appealed to the Supreme Court, which affirmed the judgment of the district court, (R. 181), but on a finding that the instrument was an agreement to sell, to the specific performance of which plaintiff was entitled. The Court also held that the judgment in *Cerami v. Haas*, (R. 203), was *res judicata* on the validity of the instrument as an agreement to sell, and then considered the validity sufficiently to hold that the simple affidavit appended to the instrument was an acceptance of it.

Petitioner applied for a rehearing, (R. 186-193), and in his petition again set up the Federal questions that had been raised in the district court, and also raised a third Federal question with respect to the Supreme Court first making the ruling in the case that the judgment in *Cerami v. Haas* was *res judicata* on the validity of the instrument as an agreement to sell. The rehearing was refused and the judgment is final, (R. 194).

SPECIFICATION OF ERRORS

1. Giving effect to the judgment in *Cerami v. Haas, 195 La. 1048, 197 So. 752*, (R. 203), as *res judicata* and the law of the case, as holding the instrument upon which plaintiff sues, (R. 3, 26), valid as a reciprocal *agreement to sell*, and founding its judgment against petitioner on that ruling. Judgment, this case, R. 181.

2. Ruling that the instrument upon which plaintiff is proceeding, (R. 3, 26), is a complete reciprocal contract to sell and decreeing that petitioner is bound by said instrument and shall convey to plaintiff the one-quarter royalty interest described therein, or that the judgment shall stand as a muniment of title in plaintiff. Answer, R. 7, pars.

5, 9, 11, 18, 19 and 20; Judgment, district court, R. 56-60; Rule for new trial, R. 61, pars. 1, 2, 2 (a) (c); Opinion and judgment, R. 181; Petition for rehearing, R. 186, pars. 6, 7 and 14. Second Question in Petition.

3. Having held that the instrument upon which plaintiff is proceeding, (R. 3, 26), was a complete reciprocal agreement to sell, in rejecting petitioner's pleading that the price stipulated in the instrument was out of all proportion to the value of the royalty interest which is the subject of said agreement at the date of the sale, and the proof thereof. Answer, R. 7, par. 17; Supplemental answer, R. 13; Opinion and judgment of trial court, R. 56; Rule for new trial, R. 61, pars. 1, 2, 2 (b), (c); Opinion and decree of Supreme Court, R. 181 185; Petition for rehearing, R. 190, pars. 10, 11, 12; Opinion *per curiam*.

POINT 1, FIRST QUESTION

Petitioner contends that, by giving effect to the judgment in *Cerami v. Haas, 195 La. 1048, 197 So. 752, (R. 203)*, as *res judicata* and the law of the case, as holding the instrument upon which plaintiff sues, (R. 3, 26), valid as a *reciprocal agreement to sell*, and founding its judgment against petitioner on that ruling, the Supreme Court of Louisiana has erred, and the judgment should be decreed null and void, and that said judgment deprives petitioner of his vested rights and of his property, without due process of law, in contravention of that clause of Sec. 1 of the Fourteenth Amendment, providing, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Petition herein, par. 4; Petition for Rehearing, pars. 1-3, 13, R. 186-188, 191.

POINT 1, (a). The judgment in *Cerami v. Haas*, is void, because it is not responsive to the pleading or within the issues of that case, and the courts had no jurisdiction to render it.

POINT 1, (b). If the judgment in *Cerami v. Haas* should be held valid, giving effect to it as *res judicata* and settling finally the validity of the instrument, as *an agreement to sell*, is not responsive to plaintiff's pleading or within the issues of this case, and the Supreme Court had no jurisdiction to render the judgment based upon that ruling, and the judgment is void.

POINT 1, (c). Petitioner timely raised the Federal question in his application for rehearing in the Supreme Court, since plaintiff pleaded the judgment in *Cerami v. Haas* as *res judicata* on the validity of the instrument as a sale, and the ruling was first made by the Supreme Court that the judgment was *res judicata* on the validity of the instrument as an agreement to sell.

POINT 1, (a)

The ruling criticized here is found in the opinion of the Supreme Court, (R. 181-184), and petitioner's pleading with respect to it is found in his application for rehearing, pars. 1-3, 13, (R. 186-188, 191), to which the Court's attention is invited, in lieu of restatement here.

The Court said, (R. 183), that the jurisprudence of the State, as enunciated in *Siegel v. Helis, 186 La. 506, 172 So. 768*, and the other cases cited, was:

> "That if defendant in a jactitation, or action for slander of title, does not answer *or otherwise*

plead to the suit, and if the plaintiff takes a judgment against him by default, the only judgment that can be rendered is a judgment ordering the defendant to bring a petitory action within the time stipulated in the judgment or forever hold his peace."

That statement falls far short of a full appreciation of the principles upon which the jurisprudence is founded. Deleting the word, "*or otherwise plead*", to which we shall refer later, the statement quoted is, as far as it goes, correct, except that it treats the Siegel-Helis Case as affirming *a single proposition of law*, applicable only where the defendant does not answer and the plaintiff takes judgment against him by default, and cites *Shreveport v. Kahn, 194 La. 55, 193 So. 461*, to the same effect. The decision in each of these cases is based upon the *two essential principles applicable to all slander of title suits*, and the *third principle that no issue of title is created by the entering of the preliminary default*. These two esesntial principles are: (1) that the *object* of the slander of title suit is *to protect possession, not to establish title, and the suit does not try the issue of title unless the defendant in his answer tenders that issue, and the issue of title in such case can be created by him only by setting up in his answer title in himself*, by means of which he becomes a plaintiff in reconvention and converts the action into a petitory one; and (2) that the *plaintiff in a slander of title suit cannot engraft on the proceeding an issue of title, either by a demand to be declared the owner of the property or by alleging the invalidity of the instrument complained of as slander of his title*. From these principles it necessarily follows that "*in the absence of an answer setting up title, the only possible issues involved in the suit are the possession*

of the plaintiff and the slander of the defendant." *Siegel v. Helis, supra, Shreveport v. Kahn, supra.* The *third* principle, the only one to which the Court referred, is applicable only in a case where the defendant does not answer and the plaintiff takes a judgment against him by default, and is really a general principle of pleading, that entering a default creates no other issue than that presented by the relevant allegations of plaintiff's petition, and is applicable to all kinds of cases. It is stated in *Siegel v. Helis, supra,* and *Shreveport v. Kahn, supra,* that "*the entry of the preliminary default is not sufficient to raise the issue of title,*" since "the entry of the default has no other effect than to form a tacit joinder of issue *on the basis of a general denial*" and "*merely serves to put plaintiff on proof of the relevant facts alleged.*"

The facts and the pleadings in *Cerami v. Haas,* as disclosed by the petition, (R. 198), were strikingly similar to those in *Siegel v. Helis,* but why, in view of the jurisprudence and the decision in the latter case conforming to it, the pleading in the former seems to have been patterned on that of the latter the writer, who was not in that case until it was on application for rehearing, does not know. The facts and the pleadings in *Siegel v. Helis* are found in the report of the case in the *Court of Appeol, 170 So. 268,* but we state them briefly: In addition to the usual allegations of possession by the plaintiff and slander of his title by defendants by recordation of certain instruments, the plaintiff alleged that *the claims of the defendants were false and that he was entitled to have them canceled from the public record and to judgment declaring him to be the absolute owner of the property, free from any claim by defendants. The prayer conformed to the*

petition. None of the defendants answered, and there was judgment by default in favor of plaintiff, in conformity to the prayer, (1) quieting him in his possession, (2) decreeing that defendants were without right, title or interest in the mineral lease, (3) decreeing plaintiff to be the owner of the lease by clear and unencumbered title, and (4) ordering the recorder to cancel from the conveyance and mortgage records the instruments complained of as slander of plaintiff's title, in so far as they affected his lease. The case finally reached the Supreme Court, and its opinion contains an able and instructive re-statement of the law:

> "Plaintiff's petition and prayer disclose that this is a jactitation or slander of title suit purely and simply. *The object of such suit is to protect possession, not to establish title,* unless defendant tenders that issue in his answer. No issue of title was tendered by defendants, and in no such issue was raised by the entry of the preliminary default. The entry of the preliminary default had no other effect than to form a tacit joinder of issue on the basis of a general denial. It merely served to put the plaintiff on proof of the *relevant facts alleged. No issue of title could be engrafted into the action by plaintiff's demand to be declared the owner of the mineral lease. In the absence of an answer setting up title, the only possible issues involved in the suit are the possession of the plaintiff and the slander by the defendants.* That is all that the plaintiff was entitled to prove. But the judgment of the district court not only maintained plaintiff's possession and condemned defendants as slanders of his title; it also decreed plaintiff to be the owner of the mineral lease by clear and unencumbered title. *In this respect it went further than authorized by law,* as

was correctly held by the Court of Appeal." *(Italics ours.)*

Further stating the nature, purpose and effect of the jactitation or slander of title suit, the Court said:

> "In a jactitation or slander of title suit, the relief sought is that defendant be ordered to bring suit to establish his pretensions, pay damages for slander, and that plaintiff be quieted in his possession. *It does not try the issue of title, unless defendant in his answer chooses to tender the issue of title, the character of the action was not changed.* Plaintiff having proved his possession and the slander, the Court of Appeal was correct in ordering appellants to institute their suit in revindication of their rights appearing on the public records, thus terminating the action. As shown by the opinion of the Court of Appeal on rehearing, *the judgment is in acordance with the prayer of the plaintiff's petition.*" (Italics ours.)

Obviously, the Court meant the judgment was in accordance with the *legal* prayer of plaintiff's petition, because all the petition and prayer, except that within the scope of the jactitation or slander of title suit, had been rejected as though not made by the Court of Appeal and the Supreme Court. *Shreveport v. Kahn, supra,* follows this decision *verbatim.*

> *Rudd v. Land Co., 188 La. 490, 177 So. 583; Allison v. Maroun, 193 La. 286, 190 So. 408; Ludeau v. Jacob, 192 La. 902, 189 So. 570.*

The principles upon which it is held that a question of title is not and cannot be involved in a slander of title suit are not founded on jurisprudence alone; they are in

deference to the statutory law of the State. As was said in *Patterson v. Landru, 112 La. 1069, 1074, 36 So. 857, 858,* Being in *possession,* the owner cannot bring a petitory action, the proceeding by which one *out* of possession may test his claim to title with another *in* possession, Code of Practice, Art. 5, or with another *also out* of possession, Act 38 of 1908. And in *Ludeau v. Jacob, 191 La. 427, 175 So. 458,* it was said that a jactitation or slander of title suit is a personal action. There is no law authorizing one *in* possesion to test his claim to title with another *out* of possession.

In the first sentence of its opinion in *Cerami v. Haas,* (R. 203), the Supreme Court said, "This is a jactitation suit," and so had each side said in the first sentence of its brief. It is so recognized in the opinion in this case, (R. 185). But it is said that the nature of the slander of title suit is changed if the defendant answers *or otherwise pleads.* It is also said that the principles of the cited cases do not apply to the case of *Cerami v. Haas,* because the validity of the instrument was put at issue by the allegation of Cerami that it was not valid and pleading of Haas that the petition did not set forth a right of action, because the instrument was valid. All this clearly conflicts with the principles we have discussed. Moreover, the pleading and the prayer in *Siegal v. Helis, supra,* were almost exactly the same as in *Cerami v. Haas,* while in *Shreveport v. Kahn, supra,* the petition was the same and the defendant filed an exception of no cause of action, just as Haas did. It was not said in the *Kahn* case that the allegations of the petition that the instrument was invalid and the exception of defendant had the effect of changing the nature of the suit and putting the validity of the instrument in issue; the ruling was just the contrary.

"Courts are not at liberty to decide cases upon issues which are raised only in argument and which irreconcilably conflict with those presented by the pleadings." *Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207, 220.*

The principle is jurisdictional and is clearly stated in *33 C. J. 1076:*

"In addition to jurisdiction of the parties and the subject matter, it is necessary to the validity of a judgment that the court should have jurisdiction of the question which its judgment assumes to decide, and jurisdiction to render a judgment for the particular remedy or relief which the judgment undertakes to grant. *A judgment not authorized by law is void. Jurisdiction is limited to a determination of the issues presented for decision.*" (Italics ours.)

And on page 1139:

"A court cannot properly put upon its record a judgment which is not a proper sequence to the pleadings. *The judgment must conform to and be supported by the pleadings in the case.*" (Italics ours.)

In *Stockton v. Reynolds, 140 U. S. 254, 35 L. Ed. 464,* it was said that, in addition to jurisdiction of the persons and the class of cases to which the one to be adjudged belongs, it is essential to the validity of the judgment that the point to be decided be, in substance and effect, within the issue.

The principles upon which it is held that an issue of title is not and cannot be involved in a slander of title

suit are inherent in the statutory law of the State, and the jurisprudence recognizes, but cannot change them. More than a century ago, it was said in *Livingston v. Heerman, (La.) 9 Mart. (O. S.) 714*, that, *being in possession*, the plaintiff could not bring a petitory action, the proceeding by which one *out of possession* may test his claim to title with another *in possession*. *Code of Practice, Art. 5.* And in *Patterson v. Landru, 112 La. 1069, 1074, 36 So. 857, 858*, it was quoted with approval and followed. In *Ludeau v. Jacob, 191 La. 427, 430, 185 So. 458*, it was said that a slander of title suit is a personal action.

There is no law in Louisiana authorizing one *in possession, as plaintiff*, to test his claim to title with another *out of possession*. And since an issue of title pleaded by a plaintiff in a slander of title suit is not permissible, it was held in *Siegal v. Helis, supra, Shreveport v. Kahn, supra, Ludeau v. Jacob, supra, Flanagan v. Land Development Co., supra*, and in a line of decisions for more than a century that a judgment founded on such pleading is not responsive to the permissible pleading or within the legal issues of the case, and the court has not jurisdiction to render it.

We submit, therefore, that the judgment in *Cerami v. Haas* is void, that in holding it valid and *res judicata* on the validity of the instrument involved as an agreement to sell, and in enforcing it against petitioner, the Court has sustained and enforced a judgment which it had not jurisdiction to render, and so has deprived petitioner of his property, without due process of law.

POINT 1, (b). Giving effect in this case to the ruling that the validity of the instrument as an *agreement*

to sell is *res judicata* or settled finally by the judgment in *Cerami v. Haas* is not responsive to plaintiff's pleading or within the issues of the case as presented by that pleading. Hence, the judgment herein is null and void.

Haas sued on the instrument as a *completed and executed sale* and prayed for judgment ordering petitioner to execute a deed *evidencing the sale.* In his petition, (R. 1), he alleged: par. 2, that *by the instrument,* which he makes part of his petition, petitioner *sold* the royalty interest to him and agreed *in the sale* that, upon perfection of title defects then being straightened out, he would *deliver a deed;* in par. 3, that the *validity of the sale was upheld* by the judgment in *Cerami v. Haas;* in par. 4, that in *Angichiodo v. Cerami et al.* there was judgment decreeing him to be a *holder in good faith* as having *purchased* on faith in the public records; in par. 5, that he had made repeated demands for delivery of a royalty deed *evidencing the sale of said royalty;* in par. 6, that he was entitled to a judgment ordering petitioner to perform the contract and decreeing that, in default thereof, the judgment stand as a muniment of title in plaintiff to the royalty *purchased* by him; in par. 7, that he had deposited $600 in the registry of the court for the account of petitioner. He prayed for judgment ordering petitioner to perform the contract and decreeing that, in default thereof, the judgment stand as a muniment of title in plaintiff to the royalty *purchased* by him.

In support of the exceptions of no right or cause of action (a pleading in the nature of a general demurrer, without specification), counsel for defendant argued that the instrument *was not in form or substance a sale translative of title* and, if it could be held such sale, it would be

complete and no suit for specific performance would lie. Counsel for plaintiff argued that the instrument was a *sale* and amply supported plaintiff's demand. Passing the exceptions, without formal ruling on them, the trial court proceeded to hear the case on the merits, thus overruling them. *Palama v. Livaudais, 182 La. 1035, 1039, 162 So. 765, 766.* Immediately thereafter, counsel for plaintiff, (R.18), offered the instrument, (R. 3, 26), in evidence *as a sale*, to which counsel for defendant objected, (R. 19), that the instrument was not admissible to prove title in plaintiff, for the reasons, 1st, that it was not in form or substance an act of sale translative of title, and 2nd, that it was not a complete reciprocal contract, in that, as appeared on its face, it was not accepted or assented to by plaintiff and was executed by defendant without any consideration. Counsel for plaintiff offered in evidence the petition and the answer of Haas in *Angichiodo v. Cerami et al.*, P. Ex-2, (R. 27-47), the opinion (called decree) in that case, P. Ex-3, *28 Fed. Supp. 720*, (R. 47), and the judgment dismissing that suit as to Haas, P. Ex-4, (R. 53), all to support the allegation of paragraph 4 of his petition that by the judgment in that case he was decreed to be a *holder* in good faith as having *purchased* the royalty interest involved here. Counsel for defendant objected to each of these exhibits as irrelevant and immaterial, and to the decree or judgment on the further ground that it was not responsive to the plaintiff's pleading in this case, but was contradictory thereof. Counsel for plaintiff finally offered in evidence the entire record in *Cerami v. Haas*, (R. 198-209), with particular reference to the judgment therein, P. Ex-7, *197 So. 752, (R. 203)*, in support of the allegation of paragraph 3 of his petition that by that judgment *"the validity of the sale was upheld."* To the offer of all these docu-

ments and to the offer of any testimony whatever counsel for defendant further objected, for the reason that plaintiff was suing on an *alleged completed and executed sale* and the remedy of specific performance is unknown and unsanctioned by the law of Louisiana where the contract sued on is alleged to be a *sale*, and plaintiff, alleging *title in himself by virtue of a completed sale* set out no right of cause of action for a judgment for specific performance. This objection was in all respects the same as urged in arguing for the exceptions.

All defendant's objections were overruled. Plaintiff made no effort to prove mutuality of the alleged *sale* or any consideration to defendant, but relied fully on the judgment in *Cerami v. Haas* as *res judicata* on the validity of the instrument as a *sale*. The court also adhered to that view, (R. 58), as indicated by the suggestion, (R. 22), that defendant's remedy was suit to set the sale aside on the ground of lesion beyond moiety, a proceeding for the rescission of a completely executed sale of real estate on the ground that the price received was less than one half of the value of the property sold at the date of the sale. Civil Code, Arts. 2589, 2590, 1871.

There was judgment for plaintiff, as prayed for, ordering defendant to execute a deed to said royalty as of February 10, 1939, the date of which it was said in *Cerami v. Haas* that Haas impliedly accepted the contract, and decreeing that, in default of such deed, the judgment stand as a muniment of title. The judgment actually confirmed title in plaintiff as of February 10, 1939, and the deed by defendant was to be merely *evidence of the sale*, as plaintiff had prayed. That judgment was entirely responsive to plaintiff's pleading, except that it confirmed title in him

as of February 10, 1939, instead of November 1, 1938, the date on which defendant signed the instrument. Since the judgment in *Cerami v. Haas* clearly did not hold that the instrument was a sale and the instrument itself bore no slight resemblance to a sale, defendant believed the judgment entirely out of harmony with the definition of a sale under the Louisiana law.

> "The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. Three circumstances concur to the perfection of the contract, to-wit: the thing sold, the price and the consent."
>
> *Civil Code, Art. 2439.*
>
> "In a sale the property, ownership of the thing sold, passes at once out of the vendor and to the purchaser, his heirs and assigns forever."
>
> *Logan v. State Gravel Co., 158 La. 105, 107, 103 So. 526.*

Clearly, then, plaintiff's demand for a deed *evidencing the sale* by which he alleges he had had title more than two years at the time of filing the suit has no place in Louisiana law.

By ignoring the suspensive condition expressed in the instrument plaintiff sought and the court granted confirmation of title in him as of February 10, 1939, despite the provision of Article 2043 of the Civil Code that an obligation subject to a suspensive condition cannot be executed until the happening of the condition. Ownership of the royalty interest would entitle plaintiff to the several

thousand dollars of royalties on production of oil from defendant's land, credited to this interest and held in suspense by the producer.

Such was the judgment from which defendant appealed to the Supreme Court; and he confidently expected a decision on the issues presented by the pleading and emphasized by the record.

Without referring at all to the contention of plaintiff that the instrument was a sale and he was entitled to a deed as evidence of it, the Court held, (R. 183, 184), that the validity of the instrument as an agreement to sell was *res judicata* by the judgment in *Cerami v. Haas.* The Court, quite clearly, deals with the instrument as an *agreement to sell,* (R. 183, last two sentences, 185). That it did consider the instrument an agreement to sell appears from the discussion on page 185, where it was recognized that defendant had proved the royalty interest to have become very valuable "since the agreement was made," but was also held that "in determining the question of adequacy of the price in a contract of sale, the value of the thing sold or *to be sold* must be taken as of the date of the contract, and not at some subsequent date." Specifically, in that discussion and in the opinion *per curiam,* (R. 194), it was held that the "date of the contract" involved here was February 10, 1939. Had the Court accepted the view of plaintiff and the district court that the instrument was a completed and executed sale as of February 10, 1939, it would also have agreed that an action for rescission for lesion beyond moiety was defendant's remedy, if he had any. Discussion of *avoidance of the proposed sale,* under authority of Art. 2464 of the Civil Code would not have been appropriate.

The judgment of the Supreme Court affirmed the judgment of the district court; but, from the opinion, it is obvious that the judgment was intended to be and is for specific performance of an *agreement to sell* by executing a deed conveying to plaintiff a *title not already vested in him*, and not by executing a deed *as evidence of a sale* already completed and executed and *by which plaintiff already has title*. In Louisiana, as elsewhere, *res judicata* must be specially pleaded. *Thompson v. Vance, 111 La. 548, 35 So. 741.* It was pleaded by plaintiff as settling the validity of the instrument as a sale, and he would not have been heard to say that it settled the validity of the instrument as an agreement to sell; and the Court had no right to award him judgment on the ground to which he could not have changed. The legal difference between a *sale*, such as plaintiff alleged and the district court held this instrument was, and an *agreement to sell*, such as the Supreme Court held the instrument was is such that one cannot be substituted where the other is pleaded and relied on.

> "A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same." *Civil Code, Art. 2462.*

> "Any agreement for the sale of real estate which is not intended to be the final writing between the parties, but, on the contrary, to be followed by another and final deed, is a mere promise of sale and not a sale, and does not transfer title to said property." *Trichel v. Home Insurance Co., 155 La. 459, 99 So. 403.*

The judgment of the Supreme Court is not respon-

sive to the pleading or within the issues of the case, and the Court had no jurisdiction or power to render it. For that reason, the judgment should be decreed null and void.

POINT 1, (c)

As set out in paragraph 4 (d) of the petition for *certiorari* and more fully in discussion of Point 1, (b), immediately above, the ruling that the judgment in *Cerami v. Haas* was *res judicata* on the validity of the instrument, (R. 3, 36), as an agreement to sell was first made in the Supreme Court, and the application for rehearing presented the first opportunity for petitioner to raise the Federal question. The question was timely raised. See authorities cited in paragraph 3, (e) of the petition for *certiorari*.

POINT 2, SECOND QUESTION

Petitioner contends that the ruling of the Supreme Court of Louisiana that the instrument upon which plaintiff is proceeding, (R. 3, 26), is a complete reciprocal contract to sell and the judgment of said Court decreeing that petitioner is bound by said instrument and shall convey to plaintiff the one-quarter royalty interest described therein, or that the judgment shall stand a muniment of title in plaintiff, are erroneous and deprive petitioner of his property, without due process of law, in contravention of that clause of Sec. 1 of the Fourteenth Amendment, providing, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Petition herein, par. 5; Answer, pars. 5, 9, 11, 18, 19, 20, (R. 7); Rule for New Trial, pars. 1, 2, 2 (a), (b), (R. 61); Petition for Rehearing, pars. 4-9, 14, (R. 186).

POINT 2, (a). For want of mutuality and consideration, the instrument is not on its face a reciprocal contract to sell, and assent of plaintiff was not alleged or proved.

POINT 2, (b). The affidavit by plaintiff appended to the instrument was not in evidence, and is, as construed by the Supreme Court, contradictory of the judgment in *Cerami v. Haas*, upon which plaintiff relies and which the Court held to be *res judicata* on the validity of the instrument; hence, it could not legally be considered as evidence and as the basis for judgment. Said affidavit, if legally subject to consideration as evidence, is not acceptance by plaintiff or evidence of agreement between the parties.

POINT 2, (c). It was not permissible to ignore the suspensive condition expressed in the instrument.

POINT 2, (a)

> "He who claims the execution of an obligation must prove it." *Civil Code, Art. 2332; Pittsburgh & Southern Coal Co. v. Slack & Co., 42 La. Ann. 107, 7 So. 230.*

The instrument lacks mutuality, in that it is signed by petitioner only and there is not elsewhere in the record evidence of plaintiff's assent to it, as required by the articles of the Civil Code of Louisiana for the consummation of contracts. Nor is there any allegation by plaintiff that he did assent to it. He alleges in his petition that the instrument is a sale, that the Supreme Court held in *Cerami v. Haas, supra*, that it was a sale and the United States District Court held in *Angichiodo v. Cerami et al.*, that

plaintiff was a holder in good faith as a purchaser on faith of the record. If the instrument is not in itself a complete reciprocal contract of sale, and clearly it is not, and if the judgments relied upon as holding that it is a sale do not so hold, and they clearly do not, the record is devoid of any evidence of mutuality of the contract. (R. 3, 26; R. 201, 203-206; R. 27-47, 47-53, 53.)

> "It is the assent of the party, or that of the person with whom he contracts which gives the contract its binding force. Both parties must be bound or neither." *Cavalier v. Germain, 6 La. Rep. 215.*
>
> *Turner v. Snype, 162 La. 117, 119, 110 So. 109;*
>
> *Thompson v. Union Sawmill Co., 121 La. 318, 46 So. 314;*
>
> *Torjusen v. Linn, 145 La. 352, 82 So. 367.*

In each of the following cases the contract, purporting to be a sale of timber and signed by the land owner as vendor, was held void, because it was not signed or accepted by the vendee:

> *Union Sawmill Co. v. Lake Lumber Co., 120 La. 106, 44 So. 1000;*
>
> *Thompson v. Union Sawmill Co., 121 La. 318, 46 So. 341;*
>
> *Riley v. Union Sawmill Co., 122 La. 863, 48 So. 334;*
>
> *Union Sawmill Co. v. Mitchell, 122 La. 900, 48 So. 317;*

Snell v. Union Sawmill Co., 159 La. 604, 608, 105 So. 728.

And in *Harang v. Ragan, 134 La. 201, 63 So. 875,* it was held that an instrument in the form of an agreement to sell, signed by Regan only and not accepted in a separate instrument by Harang, was a unilateral proposal to sell, and was void for want of mutuality.

It has been consistently held that an interest in all the oil, gas and other minerals under the surface of land falls in the category of immovables. *Hanby v. Texas Co., 140 La. 189, 72 So. 933.*

Goldsmith v. McCoy, 190 La. 325, 182 So. 519;

Jefferson v. Childers, 189 La. 46, 179 So. 30.

And that is also true under Act 205 of 1938, which was adopted for the purpose of putting in statute form the rule already adopted by the Courts.

Article 2440 of the Civil Code is a rule of substantive law, in that it provides that sales of immovable property otherwise than by authentic act or under private signature shall be null, and, with a single exception, Civil Code, Art. 2275, cannot be proved.

Goldsmith v. Parsons, 182 La. 122, 161 So. 175;

Carter v. Loeber, 177 La. 444, 148 So. 673;

Lindner v. Cotonio, 175 La. 352, 143 So. 286;
and on back through an unbroken line of decisions to

Heirs v. Yocum, 3 Mart. (O. S.) 424,
in which in 1814 it was said:

> "Nothing can be more positive than the prohibition of our law ever to recognize as valid a verbal sale or a verbal promise to sell, an immovable or a slave." Citing Civil Code, Art. 2437, now 2462.

Plaintiff has not alleged it, but may urge here, as he did in argument in support of his exceptions in *Cerami v. Haas*, that his acceptance of the contract is implied from his filing it for record on February 10, 1939, three and a half months after its date. But that is not tenable. As defendant alleged in paragraph 11 of his answer, (R. 9), the instrument dated November 1, 1938, does not grant plaintiff a right or option to accept it at a future date, or to purchase the royalty at a future date. It does not conform in any respect to Article 2462 of the Civil Code, that one may purchase the option to accept an offer or promise to sell within a stipulated time after the date of the purchase thereof, for any consideration agreed upon. Nor can plaintiff urge that, without a formal option, he had the right to accept the contract at some future time that his convenience or advantage might dictate. The instrument is in the form and substance of a contract *in praesenti*, to be completed at the moment by the assent of both parties thereto; and where such instrument is signed by one party the other has no delay in which to accept, not absolutely necessary to do so. Civil Code, Art. 1809. Considering an instrument which purported to be a sale, but was signed by only the vendor, the Court said:

> "it is important in this connection to observe that what we may have called an 'offer' is not in the form of an offer at all. The language used imports a contract, completed at the moment by the assent of both the parties thereto."

And it was held that the named purchaser had not a delay in which to accept.

Riley v. Union Sawmill Co., supra;
Union Sawmill Co. v. Lake Lumber Co., supra.

In *Union Sawmill Co. v. Mitchell, 122 La. 900, 48 So. 317,* the same form of contract was considered, with particular reference to an alleged acceptance of it sometime later. The Court said:

> "As a matter of fact, the vendees waited for giving their acceptance until the construction of the railroad had become an assured thing, more than a year after the Loper contract, and *more than three months* after the date of the two other contracts. In other words, theirs was pure speculation. If the railroad came to make the timber valuable, they accepted; if not, not. We do not think the intention was to allowed then this opportunity for speculation." *Civil Code, Arts. 1801, 1802, 1809.*

In view of the fact that it is admitted that, on November 1, 1938, the date on which petitioner signed the instrument, there was no production of oil on this land or in the immediate vicinity, and of the completion of the well on the Haas land adjoining petitioner's land during January, 1939, Haas Test., R. 23; D. Ex. 23, (R. 177), not admitted in evidence in the trial court but referred to in the opinion of the Supreme Court, and of the recordation of the instrument by plaintiff on February 10, 1939, we paraphrase the above quotation from the *Mitchell* case:

> "As a matter of fact, the vendee waited for giving his acceptance until the discovery of the oil

> field had become an assured thing, *more than three months* after the date of the contract. In other words, his was pure speculation. If the oil well came in to make the royalty interest valuable, he accepted; if not, not. We do not think the intention was to allow him this opportunity for speculation."

Even if it should be held that plaintiff had the right to accept this instrument three and a half months after this date, the fact remains that acceptance of an agreement to sell immovables cannot be implied. *Article 2462 of the Civil Code* provides that such agreement, if it is in writing, so far amounts to a sale as to give either party the right to enforce specific performance of it. It is not a rule of evidence; that the instrument must be in writing to exist at all is substantive law. It necessarily follows that acceptance of such agreement cannot be implied.

Levy v. Levy, 114 La. 239, 38 So. 155.

As to consideration, it is sufficient to say that none was paid for the alleged contract, and that under Articles 1893, 1896 and 1768, a contract without a consideration is void.

POINT 2, (b)

Holding that the judgment in *Cerami v. Haas,* (R. 203), was *res judicata* and settled finally the law of the case on the validity of the instrument as an agreement to sell, (R. 181-184), the Supreme Court declined to consider the question of invalidity of the instrument, for want of mutuality and consideration, urged by petitioner. That conformed to the rule in Louisiana, as elsewhere, that

where a judgment of a court of competent jurisdiction has become final questions determined in the case are conclusive on the parties. *McNeely v. Hyde, 46 La. Ann. 1083, 15 So. 167.* The rule is too well-settled to require citations.

But the Court immediately proceeded, to consider the affidavit of plaintiff appended to the instrument, and held that it was written evidence of the agreement between the parties. The Court erred because, 1st, the question being *res judicata* by the judgment in *Cerami v. Haas,* the Court had not jurisdiction to consider the validity or invalidity of the instrument; 2nd, plaintiff had not pleaded acceptance by that affidavit or offered it in evidence as proof of acceptance; 3rd, holding that the affidavit was written evidence of the acceptance by plaintiff directly overruled *Cerami v. Haas,* in which it was said that: "The contract of November 1, 1938, *shows on its face the reciprocal consent of both parties* 'as to the thing, the price and terms'," thus meeting the requirements of Article 2462 of the Civil Code there quoted, (R. 204, 205), (Italics by the Court); and, also on page 205, "such recordation was also an act on the part of the defendant clearly indicating acceptance of the contract"; 4th, the affidavit is not and does not purport to be an acceptance by Haas, and he never pretended that it was, as evidenced by his reliance upon acceptance implied from his filing the instrument for record, in *Cerami v. Haas,* and reliance in this case upon the judgment in that case as *res judicata.* We referred to this quite fully in paragraphs 4, 5 and 6 of the petition for rehearing, (R. 188). As a matter of fact, plaintiff did not pretend to execute the affidavit as a principal to the instrument, but as a witness to it, and for the sole purpose of meeting the requirements of Article 2253 of the Civil

Code, as uniformly construed, that signatures to every private instrument affecting real estate must be proved before recordation of the instrument.

We submit that, in so far as the judgment against petitioner is founded upon that affidavit, it should be considered and held null and void, and coming within the scope of POINT 2, SECOND QUESTION.

POINT 2, (c)

That the judgment herein is arbitrary and oppressive is, we believe, not open to question. In the instrument, (R. 3, 26), it is expressly provided that petitioner will execute a royalty deed "upon perfection of title defects now being straightened out." Plaintiff took cognizance of that condition by filing this suit (R. 1), on November 13, 1940, the day after the decree of the United States District Court rejecting Angichiodo's claim to the land, (Opinion, October 21, 1940, 35 Fed. Supp. 359), not in this record, but referred to in paragraph 5 of plaintiff's petition as decreeing plaintiff's title good and valid and free from defects. Plaintiff also referred to the condition in paragraph 2 of his petition, and made the instrument itself part of his petition. The district judge noticed it in his opinion, (R. 56), the Supreme Court had recognized it in the opinion in *Cerami v. Haas*, (R. 203), and recognized it again in the opinion in this case, (R. 181). The existence of that condition was recognized by all concerned. Petitioner, as defendant, filed a plea of prematurity, (R. 4), which he withdrew on January 22, 1941, for the reasons set out in his motion, (R. 5), thus waiving the condition as of that date. Plaintiff had waived it by his suit, so that on *January 22, 1941*, the obligations of the parties,

if there were any, became executory and subject to enforcement by either party.

It had been said in *Cerami v. Haas*, (R. 203), that acceptance of the instrument by Haas was implied from his filing it for record on February 10, 1939. Ignoring the condition altogether, the district court ordered petitioner to execute a deed to plaintiff as of *February 10, 1939*, and decreeing that, in default of such deed, the judgment stand as a muniment of title in plaintiff, as of *February 10, 1939*. The Supreme Court affirmed that judgment, (R. 181). Plaintiff had not prayed for such judgment, but got it. Article 2043 of the Civil Code provides that an obligation contracted on a suspensive condition which depends on a future event cannot be executed until after the happening of the condition. Between February 10, 1939, and January 22, 1941, five producing oil wells were drilled on petitioner's land and royalties credited to the royalty interest involved here and held in suspense by the producer on account of the Angichiodo suit and this controversy amounted to over $5,000 by the latter date, as appears from the evidence in the record and to which we shall refer in discussing POINT 3, THIRD QUESTION, in this brief. Since royalties will follow ownership of the royalty interest, the implications of this feature of the judgment are clear.

We submit that, for the foregoing reasons, the judgment herein is in contravention of the statute law of the State of Louisiana governing contracts, and particularly Article 2043 of the Civil Code, and is void.

POINT 3, THIRD QUESTION

Petitioner contends that, having held that the instrument upon which plaintiff is proceeding, (R. 3, 26),

was a complete reciprocal agreement to sell, the Supreme Court of Louisiana erred in rejecting petitioner's pleading that the price stipulated in said instrument was out of all proportion to the value of the royalty interest which is the subject of said agreement at the date of the sale, and the proof thereof, and the judgment of said Court decreeing that petitioner is bound by said instrument and shall convey to plaintiff the one-quarter royalty interest described therein, or that the judgment shall stand as a muniment of title in plaintiff is erroneous and deprives petitioner of his property, without due process of law, in contravention of that clause of Sec. 1 of the Fourteenth Amendment, providing, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Answer, par. 17, (R. 10); supplemental answer, (R. 13); Opinion and judgment of the trial court, (R. 56); rule for new trial, pars. 1, 2, 2 (b), (c), (R. 61); opinion and decree of the Supreme Court, (R. 181, 185); petition for rehearing, pars. 10, 11, 12, (R. 190); opinion *per curiam* and order denying rehearing, (R. 194).

POINT 3, (a). The date of the sale was January 22, 1941.

POINT 3, (b). To determine whether or not the price is out of all proportion to the value of the thing sold, it is necessary to take the value as of the date of the sale.

POINT 3, (c). The provisions of Article 2464 of the Civil Code are applicable to sales of royalty interests.

POINT 3, (d). The price stipulated in the instrument is $600 and the evidence shows that, as of the date of the sale, the royalty interest had an actual value of

$95,264, including returns from production credited to it and held in suspense by the producer on account of conflicting claims and known reserve.

Of course, as said in paragraph 17 of his answer, petitioner's pleading and argument in reference to the disproportion between the price and the value of the royalty interest are necessarily in view of it being finally held that the instrument sued on is a complete reciprocal agreement to sell.

POINT 1, (a). The Supreme Court, (R. 185), referred to "the agreement" twice and to "the contract" twice, and in the last sentence speaks of "a sale or an agreement for the sale of mineral rights" and of "the value of mineral rights sold or to be sold", but did not say when this agreement for the sale of mineral rights became or would become a sale within legal contemplation. Such an expression would have been helpful. Several articles of the Civil Code, to which we refer, are informing:

> "2462. A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immovables, is in writing, *so far amounts to a sale, as to give either party the right to enforce specific performance of same.*"

The corresponding article of the Civil Codes of 1808, 1825 and 1870, and Article 1589 of the Cope Napoleon, read:

> "A promise to sell *amounts to a sale*, when there exists a reciprocal consent of both parties, as to the thing and the price thereof."

Differently from the French courts and law writers, the Supreme Court of Louisiana had already construed the article to mean just what *in its present form* it expressly means.

> "We understanad article 2437 (now 2462) to mean that a promise to sell, when the thing to be sold and the price of it are agreed upon, is so far a sale that it gives either party the right to claim *ricta via*, the delivery of the thing and payment of the price; but such promise does not place the thing at the risk of the promisee, *nor does it transfer to him the ownership or dominion over it.*"
>
> *McDonald v. Aubert, 17 La. Rep. 448.*

Where the written agreements were declared by the parties to be sales, but there remained a further instrument to be executed to vest title in the vendee, they were held to be only agreements to sell.

> *Broadwell v. Raines, 34 La. Ann. 677;*
> *Thompson v. Duson, 40 La. Ann. 712;*
> *Baldwin v. Morey, 41 La. Ann. 1105, 6 So. 796.*

These cases and *Trichel v. Home Insurance Co., supra*, are representative of a large number of cases, with no digressions from the jurisprudence.

> "2043. The obligation contracted on a suspensive condition, is that which depends, either on a future or uncertain event, or on an event which has actually taken place, without its being yet known to the parties. In the former case, the obligation can not be executed till after the event; in the latter, the obglication has its effect from the day on which it was contracted, but it cannot be enforced until the event be known."

In harmony with that article, it was held in *Lewis & Co. v. Brock, 123 La. 1:*

> An agreement to buy real esate, "provided the titles are good and sufficient and approved by a judgment of court," has no binding effect until the condition has happened."

The obligation of the agreement under discussion is that petitioner will execute a royalty deed "upon perfection of title defects now being straightened out"; and those "title defects" were the suit of Angichiodo, claiming to own the land, as all agree, and the Supreme Court observed in its opinion, (R. 181). This case parallels the case just cited. So long as the "title defects" were not "straightened out" by a judgment rejecting Angichiodo's claim, neither party could demand and enforce performance of the contract by the other, in the absence of a waiver of the suspensive condition by both of them. But the instant there was such waiver by both the contract became an unconditional promise to sell, and gave "either party the right to enforce specific performance of same." Civil Code, Art. 2462. The uniform rule is that, where one is entitled to demand specific performance and does demand it, at the same time complying with his obligation under the contract, he will be decreed the owner of the property from the date of his demand and performance.

Plaintiff waived the suspensive condition of the contract by filing suit for specific performance on *November 13, 1940,* and petitioner waived the condition by withdrawing his exception of prematurity, (R. 4), on January 22, 1941, (R. 5). The suit was ample demand and the purchase price had been deposited in the registry of the court, so that, in the event of success in the suit, plaintiff should be decreed to be the owner of the royalty interest as of

January 22, 1941. That was the date of the sale.

POINT 3, (b). Article 2464 of the Civil Code, upon which petitioner relies, reads:

> "The price of the sale must be certain, that is to say, fixed and determined by the parties . . . It ought not to be out of all proportion with the value of the thing; for instance, the sale of a plantation for a dollar could not be considered a fair sale; it would be considered as a donation disguised."

Although the Court expressed no opinion as to the *date of the sale*, it did hold that, to determine whether or not the price was out of all proportion with the value of the royalty interest, the value should be taken as of the date of the contract, which it said was November 1, 1938, the date on which petitioner only signed the letter. Petitioner stressed the error of that ruling in pars. 10 and 11 of his petition for rehearing, (R. 190); and in its opinion *per curiam* the Court held that the date of the contract was February 10, 1939, the date of plaintiff's "implied acceptance" of the contract, but still refrained from an expression on the date of the sale. The Court cited *Ronaldson & Puckett v. Bynum, 122 La. 687, 48 So. 152*, as supporting its views, but examination of the original record in connection with the opinion disclosed the following:

> "On *August 1, 1900*, Mrs. Bynum leased to Ronaldson & Puckett a plantation for a period of five years, with the privilege of purchasing the property at any time during the term of the lease for $9,500; on *May 3, 1903*, two years and nine months later, they informed her in writing that they 'desired to exercise their privilege under the contract to buy said plantation'; she refused to convey title, and on *May 13, 1903*, they made formal tender of the price set out in the agreement and

demanded that she execute a deed conveying the property to them. She refused. They sued for specific performance of the agreement to sell, and prayed that Mrs. Bynum 'be ordered to sign an act of sale transferring said plantation to petitioner and to receive said price; that, in the event of her refusal to sign the act of sale, it be decreed that said property pass to petitioner on *May 13, 1903*, by reason of the tender and other facts recited, and that the judgment stand in lieu of said signature.' In her answer, Mrs. Bynum admitted the execution of the lease and option as alleged by plaintiff, and further alleged that the exercise of 'said alleged privilege or option would have been invalid and illegal, because of the fact that said plantation, *at the time of the pretended exercise of said alleged option*, was worth more than twice $9,500.00, and such sale, if otherwise valid, would have been void for lesion beyond moiety.'

"Plaintiff contended that for the purpose of determining whether or not there was lesion beyond moiety, the value of the property should be reckoned as of *August 1, 1900*, the date of the agreement by which, for a valuable consideration, defendant bound herself to sell the property. Defendant contended that '*May 13, 1903*, should be the date, under authority of Article 2590 of the Civil Code, which says that the price should be determined "at the time of the sale".'"

Upon thoughtful consideration and a review of French authorities, the Court held that the value of the property should be taken as of May 13, 1903. In a word, it was held that the value should be taken as of the date on which the right accrued to each party to demand and enforce specific performance. That was the "date of the sale."

The Court has treated the action for rescission for lesion beyond moiety and proceedings to void the agreement to sell here as analogous. Both Article 1871 and Article 2590 of the Civil Code provide that, to ascertain whether or not there is lesion beyond moiety, the immovables must be estimated at their value at the time of the sale.

> "In all questions of lesion the value of the property sold at the time of the sale is the rule by which the lesion is to be ascertained." *Mayard v. Laporte, 109 La. 110.*

We submit that the article is clear, and that the Court's ruling is definitely at variance with it.

POINT 3, (c). The Court held that, because the value of a royalty interest in unproven land is speculative, there was no right under Art. 2464 to "annul a sale or an agreement for the sale of minerals rights in non-producing land, on the ground that the price stipulated is out of all proportion to the value of the mineral rights sold or to be sold." But for arbitrarily holding that the value must be taken as of the date of the agreement to sell and not the date of the sale, the Court would have had no situation to which to apply that statement, because on the date of the sale there were five producing oil wells on petitioner's land, and there was nothing speculative about production. Even so, we construe *Wilkins v. Nelson, 155 La. 807, 99 So. 607*, and other cases in which it was held that sales of mineral rights in unproven and non-producing land would not be rescinded for lesion beyond moiety, without exception, to be based on the impossibility of proving value with any certainty.

In *Sanders v. Busch-Everett Co., 138 La. 1049, 71 So. 153*, the decision was reached upon a finding that the consideration for the option or right to drill for oil and gas was not "out of all proportion to the value of the thing," within the meaning of Article 2464 of the Civil Code. In their brief, quoted at page 1064 of the opinion, counsel for plaintiff argued that the "leases were void for want of mutuality and as containing a potestative condition," and cited *Murray v. Barnhart, 117 La. 1026, 42 So. 489; Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253; Gray v. Spring, 129 La. 360, 56 So. 305; Goodson v. Vivian Oil Co., 129 La. 958, 57 So. 281;* and *Long v. Sun Co., 132 La. 601, 61 So. 684,* in support of their views. But the Court rejoined:

> "We apprehend, however, that upon careful consideration of the cases upon which the counsel rely, as well as others which are supposed to have dealt with the issues here presented, *it will be found that in each of them,* by reason of differences in the contracts, the issues were not the same as here, and *that upon the whole, the conclusions of the court were predicated upon its finding that there was no serious price, or price proportioned to the value, as contemplated by C. C. 2464, moving to the owner of the land as a consideration for the rights conveyed to the other party.*" (Italics ours.)

In everyone of these cases "the right conveyed to the other party" was the right or option to drill for oil or gas on non-productive and unproven land. We have found no case in which the ruling of the Court was the same as here. The above cases establish a fixed line of jurisprudence.

In *Murray v. Barnhart, supra,* it was said:

> "At common law 'the slightest consideration is sufficient to support the most onerous obligation. The adequacy, as has been said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.' 9 Cyc. 365; A. & E. Ency. vol. 6, p. 694. But under our law the consideration 'must be serious'; it must not be out of all proportion to the value of the thing." Art. 2464, Civ Code.
>
> "That article has special reference to the price of a sale, but the principle involved is not peculiar to sales. It is the general of the civil law, and as old as the civil law itself."

The court had no authority to except from the operation of Article 2464 any class of property, and its action should be set aside.

POINT 3, (d). While, as set out in Paragraph 6 (c) of the petition for *certiorari*, the testimony taken out of court and the exhibits returned with and as part of the testimony, were ruled inadmissible, (R. 21, 22), they are in the record identified with an exception to the court's ruling, and if deemed admissible, they might have been considered by the Supreme Court as evidence. *Young v. Parish of East Baton Rouge, 116 La. 379, 40 So. 768, 769.* It was said in the opinion of the Supreme Court that the evidence introduced by petitioner showed that the royalty interest had become very valuable since the agreement was made, but for reasons discussed in the foregoing paragraphs, the Court gave it no consideration. Documents filed and retained in the office of the Department of Minerals, pursuant to law and the rules of the Department are public records and copies certified by the custodian thereof are admissible in evidence. *Succession of Derigny, 128 La. 853, 858, 55 So. 552.*

Mr. Moresi, qualified as an expert geologist, testified fully with respect to the oil under petitioner's land, (R. 70, 82). His report, Def. Ex. 22, contains substantially his testimony. He calculated that, as of November 1, 1940, the reserve under petitioner's land was worth $90,516.52, to which should be added the amount held in suspense by the producer to the credit of this one-fourth royalty, one-fourth of 15,295 barrels at $0.98 per barrel, $3,747.52 to November 1, 1940, or a total of $94,264. Calculated from the monthly reports, Def. Ex. 20 (R. 158), and Def. Ex. 21, (R. 167), there was an additional amount of 1,083.88 held in suspense for November and December, 1940, or a total of $4,831.40.

From the testimony of Mr. Carnahan, (R. 75), and Mr. Lambremont, (R. 78), both qualified as expert dealers in royalties and mineral rights, it appears that at the time they were testifying, March 13, 1941, the twenty and one-half royalty acres comprising the one-fourth royalty interest involved here, had an active market value of from $1,200 to $1,400 per acre, or a total of $26,650 to $28,700.

We submit that the Supreme Court erred by rejecting the statute law of the State and adopting its own rule, and by reason thereof, refusing to examine the testimony in the record and render judgment for petitioner, because of the great disproportion between the price and the value of the royalty interest.

We have presented our view of the facts and the law of this case as well as we could, and we earnestly hope that upon consideration of the petition and brief, along with the record, the Court will find that the Federal questions presented were necessarily decided, in order to make the

judgment adverse to those claims. Had the Court maintained any one of them, it could not have rendered the judgment against defendant.

We earnestly believe too that, if the record is ordered up, the Court will find it necessary to consider the evidence and particularly the lack of evidence to support the judgment.

We understand that the principle here is so well-settled as not to require argument or citations, and we shall burden the Court with none besides a single citation to make clear our understanding of the matter:

> "But a State may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with the Amendment. In determining what is due process of law regard must be had to the substance, not to form." *Chicago, B. & Q. Railroad Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979.*

We respectfully submit that the writ of *certiorari* prayed for should be granted, and that the judgment complained of should be reversed.

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(32)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 773

SAM CERAMI,

Petitioner,

versus

W. D. HAAS, JR.

BRIEF OF W. D. HAAS, JR., OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

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Filed March ....., 1943.

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

May It Please the Court:

STATEMENT OF THE CASE.

This was a suit by W. D. Haas, Jr., against Sam Cerami to compel specific performance of a contract of sale of an oil royalty. The judgment of the District Court of Louisiana ordering Sam Cerami to specifically perform the contract was affirmed by the Supreme Court of Lou-

isiana. (Transcript of Record, page 181, Haas v. Cerami, 10 So. (2d) 61).

Defendant Cerami, applicant here, claims to have raised a Federal question so as to give the United States Supreme Court jurisdiction. The so-called Federal question is stated, as follows:

> "The right to said appeal or certiorari is founded upon the proposition that the judgment of the District Court, affirmed by this (Supreme) Court (of Louisiana), deprives petitioner of his vested rights and of his property without due process of law in contravention of that clause of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall deprive any person of life, liberty or property without due process of law; * * *". Transcript of Record, pages 195, 11, 191, 192, 193.

JURISDICTION.

The United States Supreme Court is without jurisdiction to grant certiorari in this case.

There was not drawn into question the validity of a statute of Louisiana on the ground of its being repugnant to the United States Constitution, or laws of the United States. No title, right, privilege, or immunity is set up or claimed under the Constitution. Judicial Code, Sec. 237. It is merely claimed that the judgment of the Louisiana Supreme Court enforcing a contract of sale is in contravention of laws of Louisiana.

Whether the provisions of the Revised Civil Code of Louisiana and Code of Practice are to be construed one

way or another is a State question, the final decision of which rests with the courts of the State. The due process of law clause in the Fourteenth Amendment does not take up the Statutes of the several States and make them the test of what it requires; nor does it enable the United States Supreme Court to revise the decisions of the State courts on questions of State law.

> "Castillo v. McConnico, 168 U. S. 674, 682, 683, 42 L. ed. 622, 624, 625, 18 Sup. Ct. Rep. 229; West v. Louisiana, 194 U. S. 258, 261-263, 48 L. ed. 965, 968, 969, 24 Sup. Ct. Rep. 650; Patterson v. Colorado, 205 U. S. 454, 459, 51 L. ed. 879, 880, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689; Pullman Co. v. Knott, 235 U. S. 23, 25, 59 L. ed. 105, 110, 35 Sup Ct. Rep. 2; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 166, 61 L. ed. 644, 649, 37 Sup. Ct. Rep. 318."

Respectfully submitted,

LeDOUX R. PROVOSTY,
Attorney for W. D. Haas, Jr.

Office - Supreme Court, U. S.
FILED
MAR 19 1943
CHARLES ELMORE CROPLEY
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 773

SAM CERAMI,
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WM. D. HAAS, JR.

REPLY BRIEF, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPRPME COURT OF THE STATE OF LOUISIANA

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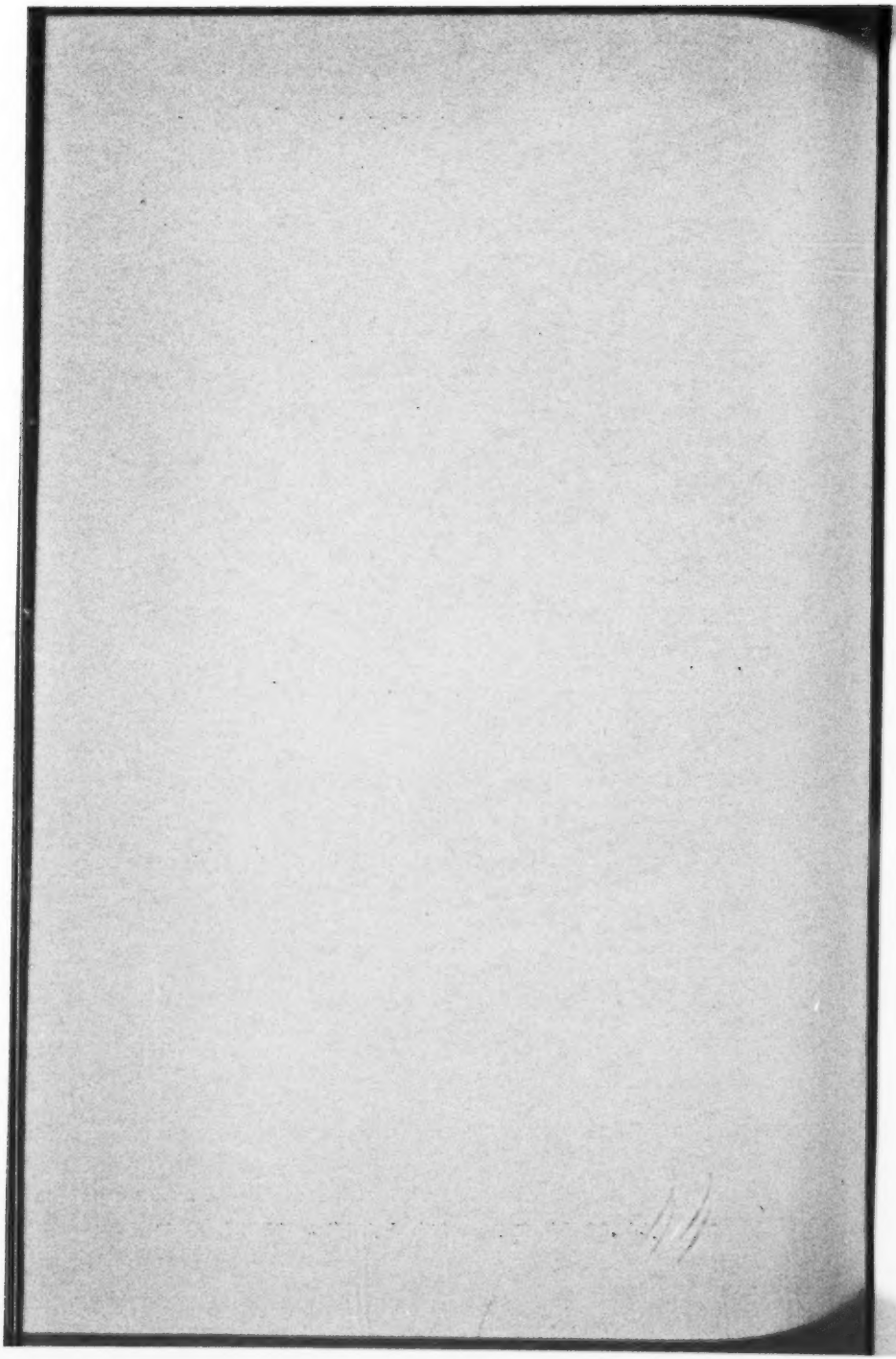

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May It Please the Court:

A reply to respondent's brief seems in order. For the greater convenience of the Court, we are inserting an appendix containing the constitutional and statutory provisions of Louisiana to which reference is made.

Respondent says that the Court has not jurisdiction to grant a writ of certiorari in this case, and assigns four reasons:

1. "There was not drawn into question the validity of a statute of Louisiana on the ground of its being repugnant to the United States Constitution, or laws of the

United States." Petitioner believes that the laws of Louisiana upon which he relies are perfectly valid and are controlling. Hence, his earnest effort to induce the courts of Louisiana to be guided by them.

2. "No title, right, privilege, or immunity is set up or claimed under the Constitution. Judicial Code, Sec. 237." That the state shall not deprive him of his property, without due process of law, is a right guaranteed to petitioner by Section 1 of the Fourteenth Amendment, and the record abundantly shows that he set up and claimed that right throughout the proceedings in the State courts.

3. "It is claimed that the judgment of the Louisiana Supreme Court enforcing a contract of sale is in contravention of laws of Louisiana." That alone might bring the case within the jurisdiction of the Court, but from the next paragraph of respondent's brief it appears that he considers petitioner's contention to be merely that the Supreme Court of Louisiana has placed upon the laws of Louisiana a wrong construction. That is not correct. Petitioner contends that the judgment holding that the instrument involved is a bilateral and reciprocal *contract to sell* and ordering petitioner to perform it is in contravention of the laws of Louisiana and deprives petitioner of his property, without due process of law.

4. "Whether the provisions of the Revised Civil Code of Louisiana and the Code of Practice are to be construed one way or another is a State question, the final decision of which rests with the courts of the State. The due process of law clause in the Fourteenth Amendment does not take up the Statutes of the several States and make them the test of what it requires; nor does it enable the United States

Supreme Court to revise decisions of the State courts on questions of State law." The last sentence is quoted from *Hebert v. Louisiana, 272 U. S. 312, 316, 71 L. Ed. 270, 273,* where it is followed by, "What it does require is that state action, whether through one agency, of another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'." Thus, respondent's statement of the law is substantially correct,—"providing always that the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law," as was said in *Castillo v. McConnico, 168 U. S. 674, 693, 42 L. Ed. 622, 626,* the first case cited by respondent. But, as said before, no such question is presented here. Petitioner does not complain that the construction of laws of Louisiana by the Supreme Court of the State is erroneous. *The record is devoid of construction of any law of Louisiana.* Petitioner relies upon the laws as they stand, clear and free from ambiguity. He contends that the judgment is in contravention of those laws, and that "by disregarding both the letter and the spirit of those laws and substituting therefor its own fiat, the Court has disregarded also the plain mandate of Article 13 of the Civil Code; and has indulged in judicial legislation," and that, for those reasons, the judgment deprives petitioner of his vested rights and of his property, without due process of law, in contravention of specified provisions of the Constitution of Louisiana and of the Fourteenth Amendment.

The principles upon which petitioner relies are so well recognized that argument is wholly unnecessary to support them.

"The right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man."

Vanhorne v. Dorrance, 2 Dall. 304, 310, 1 L. Ed. 391. 394.

"Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before the Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

Ochoa v. Hernandez y Morales, 230 U. S. 138, 57 L. Ed. 1427, 1437.

"The Amendment (14th) governs the action of the State, whether through its legislature, through the courts, or through its executive or administrative officers."

Mooney v. Holohan, 294 U. S. 102, 113, 79 L. Ed. 791, 794.

Ex Parte Virginia, 100 U. S. 347, 25 L. Ed. 676.

Missouri Pacific R. Co. v. Nebraska, 164 U. S. 403, 417, 41 L. Ed. 489, 495.

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Raymond v. Chicago Union Traction Co., 207 U. S. U. S. 20, 36, 52 L. Ed. 78, 87.

Georgia Power Co. v. Decatur, 281 U. S. 505, 508, 74 L. Ed. 999, 1003.

In *Chicago, B. & Q. R. Co. v. Chicago, supra*, the Court was considering a final judgment of the Supreme Court of Illinois in an expropriation suit in which the amount awarded the railroad company for its property expropriated was manifestly insignificant when compared to the value of the property. Holding that the inhibition of the Fourteenth Amendment applied to the courts of a State, as well as to its legislative and executive departments, the Court said:

> "This must be so, or, as we have often said, the constitutional provision has no meaning, and 'the state has clothed one of its agents with power to annul or evade it' . . . But a state may not, by any of its agencies, disregard the prohibition of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing form of procedure in courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to the substance, not to form. This Court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616, 619. The same question could be propounded, and the same

> answer should be made, in reference to judicial proceedings inconsistent with the requirements of due process of law. . . . In Davidson v. New Orleans, above cited, it was said that a statute declaring in terms without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the 14th Amendment. . . . Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three coordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such Constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions."

In *Missouri Pacific R. Co. v. Nebraska, supra,* the Court considered an order of the State Board of Transportation of Nebraska which required the railroad company to surrender a part of its land to certain parties for the purpose of building and maintaining a grain elevator thereon, which order had been affirmed by the highest court of the State. The Court said:

> "The order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining an elevator upon it, was, in essence and effect, a taking of private property, for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for

> the private use of another, is not due process of law, and is a violation of the 14th Amendment to the Constitution of the United States."
>
> *Washington ex rel. Oregon R. & N. Co. v. Fairchild, 224 U. S. 510, 524, 56 L. Ed. 863, 868.*

That, is the situation here. Petitioner's property, shown to be worth more than $90,000, is taken from him and given to respondent for an amount considerably less than one percent. of that value; and to accomplish that purpose the Court has disregarded the statute law of the State and its own established jurisprudence and rendered a judgment clearly in contravention thereof. The Court has legislated in this case and, in doing so, has repealed by implication much of the law of contracts of the State. Of course, that is not in harmony with constitutional principles, for, as was said in *Saint v. Allen, 169 La. 1046, 1053:*

> "The principle announced in Sections 1 and 2 of Article II of the Constitution (of Louisiana) is the foundation on which our system of republican government is established, and is safeguarded in the Constitution of the United States and that of every one of the States."

If it be said that the Court has merely construed the law, that is not borne out by anything in the record; and if that were true, the rule expressed in Article 13 of the Louisiana Civil Code since 1808 would control:

> "When a law is clear and free from ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit."

In *Hamilton v. Rathbone, 175 U. S. 444, 449, 44 L. Ed. 219 221,* it was said:

> "The cases are so numerous in this court to the effect that construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary . . . where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it."

Further argument would be repetitious. That the questions presented bring the case fairly within the jurisdiction of the Court to grant *certiorari* we have no doubt. We believe that, upon consideration of the provisions of the Civil Code printed in the Appendix, along with petitioner's pleading in the State courts, the Court will find that the showing is such that a writ should be granted. And we should earnestly expect that, upon consideration of the merits on the pleading and evidence, as well as lack of evidence to support the judgment, the Court would reverse the judgment complained of.

Unfortunately, the number of questions and the manner in which they arose made it impossible to present them without a more extensive presentation of the merits than is usual in such cases; and that imposition on the Court we profoundly regret.

We respectfully submit that the writ of *certiorari* prayed for should be granted, and that the judgment complained of should be reversed.

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APPENDIX

CONSTITUTION OF LOUISIANA

Art. I, Sec. 2. No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes andafter just and adequate compensation is paid.

Art. II, Sec. 1. The powers of the government of the State of Louisiana shall be divided into three distinct departments—legislative, executive, and judicial.

Sec. 2. No one of these departments, nor any person or collection of persons holding office in any one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Art. III, Sec. 1. The legislative power of the State shall be vested in a Legislature, which shall consist of a Senate and a House of Representatives.

Art. IV, Sec. 15. No ex-post facto law, nor any law impairing the obligation of contracts, shall be passed; nor shall vested rights be divested, unless for purposes of public utility, and for just and adequate compensation previously paid.

Art. VII, Sec. 1. The judicial power shall be vested in a Supreme Court, in Courts of Appeal, in District Courts, and in such other courts as are hereinafter provided.

CODE OF PRACTICE OF LOISIANA

Art. 5. The petitory action is that by which he who has the property of real estate, or of a right upon or growing out of it, proceeds against the person having the possession, in order to obtain the possession of the immovable property, or the enjoyment of the rights upon it, to which he is entitled.

ACT OF THE LEGISLATURE OF LOUISIANA

Act 38 of 1908. In all cases where two or more persons lay claim to land by recorded title and when neither of said claimants are in the actual possession of the land so claimed, either of the claimants may bring suit against one or all adverse claimants, and for that purpose may join one or more adverse claimants in the same suit as defendants to have the titles to the land adjudicated upon by the court having jurisdiction of the property and it shall not be necessary for the plaintiff to allege or prove possession in himself or the defendants, and this action shall be known as the action to establish title to real estate, and the judge shall decide which of the claimants are the owners of the land in dispute, provided such judgment shall in no case be *res judicata* as to persons not made parties to the suit.

CIVIL CODE OF LOUISIANA

Art. 13. When a law is clear and free from ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit.

Art. 1765. To all contracts there must be at least two parties: one who does, or engages to do or not to do, another

to whom the engagement is made. If this latter party make no *express* agreement on his part, the contract is called *unilateral*, even in cases where the law attaches certain obligations to his acceptance. It is called a *bilateral* or *reciprocal* contract, when the parties *expressly* enter into mutual engagements.

Art. 1766. No contract is complete without the consent of both parties. *In reciprocal contracts it must be expressed.* In some unilateral contracts the law provides that under certain circumstances it shall be presumed.

Art. 1768. Commutative contracts are those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given, or promised by the other.

Art. 1779. Four requisites are necessary to the validity of a contract: 1. Parties legally capable of contracting. 2. Their consent legally given. 3. A certain object, which forms the matter of agreement. 4. A lawful purpose.

Art. 1780. Those only are parties to a contract, who have given their consent to it, either expressly or by implication.

Art. 1797. When the parties have the legal capacity to form a contract, the next requisite to its validity is their consent. This being a mere operation of the mind, can have no effect unless it is evinced in some manner that shall cause it to be understood by the other parties to the contract. To prevent error in this essential point, the law establishes, by certain rules adapted to the nature of the contract, what circumstances shall be evidence of such con-

sent, and how those circumstances shall be proved; these come within the purview of the law of evidence.

Art. 1798. As there must be two parties at least to every contract, so there must be something proposed by one *and accepted and agreed to by another* to form the matter of such contract; *the will of both parties must unite on the same point.*

Art. 1800. The contract, consisting of a proposition and the consent to it, *the agreement is incomplete until the acceptance of the person to whom it is proposed.* If he, who proposes, should before that consent is given, change his intention on the subject, the concurrence of the two wills is wanting, and there is no contract.

Art. 1801. The party proposing shall be presumed to continue in the intention, which his proposal expressed, if, on receiving the unqualified assent of him to whom the proposition is made, he do not signify the change of his intention.

Art. 1802. He is bound by his proposition, and the significance of his dissent will be of no avail, if the proposition be made in terms, which evince a design to give the other party the right of concluding the contract by his assent; and *if the assent be given within such time as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow.*

Art. 1809. The obligation of a contract not being complete until the acceptance, or in cases where it is implied by law, until the circumstances, which raise such implication, are known to the party proposing; he may therefore

revoke his offer or proposition before such acceptance, but not without allowing such reasonable time as from the terms of his offer he has given, or from the circumstances of the case he may be supposed to have intended to give to the party, to communicate his determination.

Art. 1860. Lesion is the injury suffered by one who does not receive a full equivalent for what he *gives* in a commutative contract. The remedy given for this injury, is founded on its being the effect of implied error or imposition; for, *in every commutative contract, equivalents are supposed to be given and received.*

Art. 1861. The law, however, will not release a person of full age, and who is under no incapacity, against the effect of his voluntary contracts, on account of such implied error or imposition, except in the following cases: 1. In partition where there is a difference in the value of the portions of more than the amount of one-fourth to the prejudice of one of the parties. 2. In *sales of immovable property,* the vendor may be relieved, if the price *given* is less than one-half the value of the thing *sold;* but the *sale* can not be invalidated for lesion to the injury of the purchaser.

Art. 1870. When lesion is alleged to invalidate a partition or *sale,* the party alleging it must first prove the *value of the property sold,* in the state in which it was at the time of the contract, according to the usual terms of credit given on *sales* of property of that description. He must then show how much the *price given* was less than such value; but *if the price given was paid* at longer periods than those usually given on such *sales,* the interest for the time exceeding such usual credit must be deducted from such price; or, *if the price was paid* in shorter periods than

those of such usual credit, then the interest for the time *such payment has fallen short* of the usual credit, shall be added to *the price actually paid;* and from a comparison of the price after these additions or deductions with the estimated value, the court shall determine whether according to law applied to the circumstances of the case, there is a lesion sufficient to invalidate the contract.

Art. 1871. In all questions of lesion the value of that which was the subject of the contract at the time of making it, is the rule by which lesion is to be ascertained. Even in cases of minors, changes in value by subsequent events are not to affect the contract.

Art. 1893. An obligation without a cause, or with a false or unlawful cause, can have no effect.

Art. 1896. By the cause of the contract, in this section, is meant to the consideration or motive for making it; and a contract is said to be without a cause, whenever the party was in error, supposing that which was his inducement for contracting to exist, when in fact it had never existed, or had ceased to exist before the contract was made.

Art. 2043. The obligation contracted on a suspensive condition, is that which depends, either on a future or uncertain event, or on an event which has actually taken place, without its being yet known to the parties. *In the former case, the obligation cannot be executed till after the event;* in the latter, the obligation has its effect from the day on which it was contracted, but it cannot be enforced until the event be known.

Art. 2044. When the obligation has been contracted on a suspensive condition, the thing, which forms the sub-

ject of the contract, is at the risk of the obligor, until the event which forms the condition has happened, subject however to the following restrictions and modifications of his responsibility: If the thing be entirely destroyed, without the fault of the debtor, the obligation is extinguished. If the thing be impaired, without the fault of the debtor, it is at the option of the creditor, either to dissolve the obligation, or to require the thing in the state in which it is without diminution of the price. If the thing be impaired, through the fault of the debtor, the creditor has the right to dissolve the obligation, or to require the thing in the state in which it is, with damages.

Art. 2232. He who claims the execution of an obligation must prove it. On the other hand, he who contends that he is exonerated, must prove the payment or the fact which has produced the extinction of the obligation.

Art. 2253. The record of an act under private signature, purporting to be a sale or exchange of real property, shall not have effect against creditors or bona fide purchasers, unless, previous to its being recorded, it was acknowledged by the party, or proved by the oath of one of the subscribing witnesses, and the certificate of such acknowledgement be signed by the parish recorder, a notary, or a justice of the peace, and recorded with the instrument.

Art. 2275. Every transfer of immovable property must be in writing; but if a verbal sale, or other disposition of such property, be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, provided actual delivery has been made of the immovable property thus sold.

Art. 2439. The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. Three circumstances concur to the perfection of the contract, to-wit: the thing sold, the price and the consent.

Art. 2440. All sales of immovable property shall be made by authentic act or under private signature. Except as providing in article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted.

Art. 2462. A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and the terms, and which, if it relates to immovables, is in writing, so for amounts to a sale, as to give either party the right to enforce specific performance of same. One may purchase the right, or option to accept or reject, within a stipulated time, an offer or promise to sell; after the purchase of such option, for any consideration therein stipulated, such offer, or promise cannot be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract or agreement to sell, evidenced by such promise or acceptance, may be specifically enforced by either party.

Art. 2464. The price of the sale must be certain, that is to say, fixed and determined by the parties. It ought to consist of a sum of money, otherwise it would be considered as an exchange. It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid. *It ought not to be out of all proportion with the value of the thing;* for instance, the sale of a plantation

for a dollar could not be considered as a fair sale; it would be considered as a donation disguised.

Art. 2589. If the vendor *has been aggrieved* for more than half the value of an immovable estate by him *sold*, he has the right to demand *the rescission of the sale*, even in case he had expressly abandoned the right of claiming such rescission, and declared that he gave to the purchaser the surplus of the thing's value.

Art. 2590. To ascertain whether there is a lesion beyond moiety, the immovable must be estimated according *to the state in which it was, and the value which it had at the time of the sale.*